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Supreme Court, U.S.

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No. _____

In the

Supreme Court of the United States

Angela G. McKenzie,

Petitioner,

versus

SETA Corporation,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED

1. Is appellate jurisdiction under the Federal Arbitration Act ["the FAA"], 9 U.S.C. § 1, et. seq., specifically under § 16 of the FAA, limited to review of district court orders confirming or denying confirmation of arbitration awards? Did the Court of Appeals err in dismissing, for lack of jurisdiction, Petitioner's post-arbitration appeals from the district court (a) order compelling arbitration and (b) orders denying her motions to vacate the award reasoning that the only final order appealable under the FAA is the order confirming the arbitral award rendered after Petitioner had already noticed and docketed her appeals?

2. Did the Court of Appeals disparately apply the jurisdictional provisions of the FAA, 9 U.S.C. § 16, inasmuch as its opinion below is in apparent conflict with this Court's decision in *First Options of Chicago, Inc. v. Kaplan, 514 U.S.* 038 (1995) as well as of other Circuits as to the jurisdictional expanse of the statute?

3. Where the Petitioner sought equitable relief under Rule 60(b)(3) of the Federal Rules of Civil Procedure upon the premise that the Respondent and its counsel obtained the order compelling arbitration by extrinsic fraud committed upon the district court, was it proper for the Appeals Court to dismiss for lack of jurisdiction Petitioner's appeal from the district court's denial of the relief she sought despite the Court's appellate jurisdiction under 28 U.S.C. § 1291 *cum* § 1294(1)?

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The opinion of the United States Court of Appeals for the Fourth Circuit in *McKenzie v. SETA Corporation, No. 99-1576* (unpublished, 4th Cir. 12/08/00) along with the Order denying the Petition for Panel Rehearing (filed 01/04/01) appear, in sequence, at pages A1 - A6 of the Appendix, hereto. The earlier, February 23, 2000, Order of the Court dismissing portion of McKenzie's appeals from the district court Orders of March 29, 1999 and April 30, 1999 appears at page A7 of the Appendix.

The Order of the District Court compelling arbitration, filed August 22, 1997, is proffered at pages A8 - A9 of the Appendix, hereto.

The Order and Memorandum Opinion of the District Court denying Petitioner's First Motion for equitable relief under Rule 60(b)(3) of the Federal Rules of Civil Procedure, filed March 29, 1999, appears at pages A10 - A13 of the Appendix.

The Order and Memorandum Opinion of the District Court denying Petitioner's Second Motion to vacate the arbitral award under 9 U.S.C. § 10 of the Federal Arbitration Act, filed April 30, 1999, is provided at pages A14 - A17 of the Appendix.

The Order of the District Court, issued May 7, 1999, confirming the arbitration award appears at page A18 of the Appendix.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fourth Circuit dismissing Petitioner's appeals for lack of jurisdiction was filed December 8, 2000. The Petition for Panel Rehearing was denied by Order filed January 4, 2001. This Petition for Writ of Certiorari is filed within 90 days from that date, *vide* 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Seventh Amendment: Right to trial by jury

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Federal Rules of Civil Procedure, Rule 60(b)

"On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: ... (3) fraud ..., misrepresentation, or other misconduct of an adverse party; .... The motion shall be made within a reasonable time, and for reasons ... (3) not more than one year after the judgment, order, or proceeding was entered or taken.... This rule does not limit the power of a court ... to set aside a judgment for fraud upon the court."

28 U.S.C. § 1291

"The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States. ...."

The Federal Arbitration Act, 9 U.S.C. § 1, et. seq.

"§16. Appeals

"(a) An appeal may be taken from -

(1) an order -
(A) refusing a stay of action under section 3 of this title,
(B) denying a petition under section 4 of this title to order arbitration to proceed,
(C) denying an application under section 206 of this title to compel arbitration to proceed,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award.
"(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
"(3) a final decision with respect to an arbitration that is subject to this title.

"(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order –
(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title."

§ 9. Award of Arbitrators; confirmation; jurisdiction; procedure

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then *at any time within one year after the award is made* any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this tittle. ...." [Emphasis added].

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

> "*Notice of motion to vacate*, modify, or correct an award *must be served* upon an adverse party or his attorney *within three months after the award is filed or delivered.* ...." [Emphasis added].

§ 10. Same; vacation; grounds; rehearing

> "(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration –
>
> (1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either one of them.
(3) Where the arbitrators were guilty of misconduct ...or any other misbehavior by which the rights of any party have been prejudiced.
(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. ...."

STATEMENT OF THE CASE

A. From SETA to the District Court

In January 1995, the Petitioner, Angela G. McKenzie ["McKenzie" or the "Petitioner"] sent her resume to SETA Corporation ["SETA" or the "Respondent"] in response to its advertisement for an administrative secretary. Her resume left no doubt that her educational background was limited to a high school diploma and her work experience entailed clerical, secretarial and support personnel functions. There was nothing in McKenzie's background that suggested any professional expertise in any field, including law. She is a lay person.

After review of her resume, SETA invited McKenzie to come in for interviews. She reported to SETA as scheduled and was asked to complete SETA's application form consisting of five pages inclusive of blank spaces to fill out and a certification, in fine print, pronouncing terms and conditions of her employment. McKenzie quickly filled out the blank spaces on the form, signed and tendered it. She was, thereafter, scheduled for a series of interviews and tests following which she was offered a secretarial position.

On February 20, 1995, McKenzie commenced her

employment with SETA as a Proposal Coordinator and was soon required to perform extensive overtime work including work on weekends and holidays. In April, 1995, McKenzie became pregnant but, because of her heavy work schedule, she neglected the pre-natal care she needed. On June 12, 1995, she suffered a miscarriage imputed, inter alia, to lack of pre-natal care. McKenzie duly informed SETA of her miscarriage, went through the necessary medical procedures and returned to work a few days thereafter.

By January 1996, McKenzie had already proven herself as a "very valuable and cheerful member" of the proposal team and was rewarded with two salary increases as well as other honors. January 1996 was also the month that she became pregnant again. Later in the month, after medically verifying her pregnancy, she formally informed SETA of her pregnancy and shared her good news with her coworkers and friends.

Considering the miscarriage she suffered six months earlier, the medical advice she was given to obtain pre-natal care if she became pregnant again and the particular difficulty of her pregnancy, McKenzie began to take time off from work to attend to her pregnancy-related illnesses and the medical care she needed. She had consistently notified her employer of her absences and had mostly relied on leave-without-pay to tend to her medical exigencies. Her pregnancy-induced illnesses and absences reduced her ability to afford SETA the substantial overtime work it was used to.

McKenzie became very ill the night of April 11 and, after notifying the employer of her illness, she went to her doctors on April 12. She spent the day going through various medical tests and procedures at three different medical facilities. She returned home at the end of the day only to find that her employer had attempted to reach her by phone several times. She immediately returned the calls and spoke with SETA's Human Resources Director who informed McKenzie that she has been "terminated

effective April 12, 1996, due to lack of work in the Proposal Department." She was also advised to clear out her desk by the following Monday.

Description of the shock, trauma and distress McKenzie had been caused by her sudden and unexpected termination is omitted. Suffice it to note here that Petitioner's income from her job represented the lion's share of her family's resources as her husband earned considerably less than she did. At any rate, soon after her termination, McKenzie discovered that, despite its allegation of "lack of work," SETA had in fact replaced her by a non-pregnant female of the same race as she is, Caucasian, who was transferred from a different department of SETA to assume McKenzie's responsibilities in the Proposal Department.

After delivery of her son, McKenzie filed a charge of discrimination against SETA with the Fairfax County Human Rights Commission (cross-filed with the EEOC) asserting that her employer unlawfully terminated her employment because of her pregnancy in violation of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). Upon fulfilling all conditions precedent and securing a Notice to Sue letter from the EEOC, McKenzie filed a four count Complaint with the U.S. District Court for the Eastern District of Virginia, Alexandria Division, on July 2, 1997. She asserted a claim under the Pregnancy Discrimination Act and stated three other counts premised on the common law. ***Invoking her constitutional Seventh Amendment right, she demanded jury trial as to all of her causes of action.***

Citing a provision in the fine print of its application form, SETA moved to compel arbitration and stay the proceedings pending arbitration. It repeatedly represented to the court that McKenzie *knowingly and voluntarily" and "validly"* executed an arbitration contract to resolve her employment disputes by arbitration. With supporting affidavits from its H/R Director, Rachael Mason, SETA went further to project McKenzie's prior clerical functions in the preparation of

employee handbooks as evidence of her *"knowing and valid undertaking"* to submit to arbitration.

Based on settled contract law principles, McKenzie argued that there is no valid arbitration contract to enforce to the extent that the application form that SETA drafted and mandated required McKenzie to *"consent and agree to"* or *"understand and agree to"* all of its terms and conditions of employment except *the "arbitration clause" which required her to "understand" [but not "agree" or "consent" to]* the terms thereof. If the court deemed the terms of the form *'ambiguous'*, then "the ambiguity is resolved against the preparer of the document," i.e. SETA; *vide*, inter alia, *Williams v. First Fed. Sav. & Loan Ass'n, 651 F.2d 910 (4th Cir. 1981).* And, "(t)he rule is particularly applicable where the ambiguous provision is alleged to constitute a waiver of the right to file a lien, as it is presumed ... that one has not precluded himself from exercising a right granted by statute (in this case the Seventh Amendment)." *VNB Mtg. Corp. v. Loan Star Indus., Inc., 215 Va. 366, 209 S.E.2d 909 (1974). On the other hand, if the court* construed the application form *'unambiguous,'* then "the court is not at liberty to search for its meaning beyond the instrument itself []..... [T]he writing is the repository of the final agreement of the parties." *Management Enterprises, Inc. et. al. v. The Thorncroft Co., 243 Va. 469 (1992).*

The district court, presided by the Honorable Judge Raymond Jackson, concluded that the terms of the application form are *"unambiguous"* but proceeded to impute *"common sense interpretation" to the "unambiguous" terms* reaching the conclusion that *"understand" and "agree" are synonymous terms.* It ruled the arbitration clause valid and binding and ordered arbitration. But the court also ordered the matter be stayed and *the arbitration be concluded within 180-days from date of filing of the claims.* This Order of the district court filed August 22, 1997, appears at *pages A8 - A9 of the Appendix.*

B. The Arbitration Proceedings

On October 21, 1997, McKenzie filed her claims with the American Arbitration Association["AAA"] at a cost of $2,000.= in filing fees alone. It soon became apparent that the arbitration to which her claims were relegated were far beyond McKenzie's means. The 180-days the district court set for the completion of the arbitration process expired with no resolution. Prompted by the deadline set by the court and the overwhelming costs of the arbitration, McKenzie moved the district court to lift the stay and resume the judicial proceedings by motion filed on ***April 9, 1998.*** The court, presided by the Honorable Judge Claude Hilton denied the motion and ordered the arbitration to proceed until completion.

The parties returned to the arbitration and McKenzie moved to proceed *in forma pauperis*. Her motion was partially granted upon continuous payment of forum fees and other expenses as the proceedings required.

Over a protracted period, between August and October 1998, the arbitrator conducted hearings for disposition of McKenzie's claims. The last day of the evidentiary hearings was ***October 24, 1998.*** This was the day when SETA presented Rachael Mason, its H/R Director, as its core management witness to testify on its behalf. *And it is extremely important to note here who Rachael Mason is.* Educationally, she holds a B.S. in Biopsychology and a Masters degree in Human Resources Development. Relative to McKenzie's high school level education, Ms. Mason's educational qualifications are beyond compare. Ms. Mason also has extensive experience in human resources management and, at the time, was in charge of SETA's personnel management and administration functions including enforcement of SETA's application form (consisting of the arbitration clause) which McKenzie filled out upon recruitment. Again, relative to McKenzie's clerical background

in assembling employee manuals, Ms. Mason's expertise and experience is beyond compare. No less significant is the role Ms. Mason played in supporting SETA's motion to compel arbitration in the district court - her affidavits were core components of the defense motion.

During her testimony, SETA's counsel (who obtained the Order compelling arbitration) revealed the following:

> **"This *(Ms. Mason) is obviously not an attorney.* And I don't have a problem with if there are conversations that Mr. Mekbib wants to inquire about on this particular topic, *as long as it is clearly understood, obviously, this witness (Ms. Mason) wouldn't know what arbitration is unless somebody knowledgeable in the law explained the situation to her.*"**

The revelation also made "obvious" that, when SETA took away *McKenzie's Seventh Amendment constitutional right to jury trial* upon the premise of its arbitration clause, it knew it was defrauding her. For it knew that McKenzie is *"obviously not an attorney"* and *"wouldn't know"* and did not know *"what arbitration is unless somebody knowledgeable in the law explained [it] to her."* It failed to advise her to obtain counsel or provide her "somebody knowledgeable in the law" to explain to her the commitment it secured from her before dashing her fundamental right by deceit and fraud.

The revelation further made "obvious" that when SETA and its counsel repeatedly proffered to the district court that McKenzie *"voluntarily, knowingly and validly"* assented to the arbitration clause (which eviscerated her jury trial rights), they knew each of their representations to be untrue, misleading and fraudulent. For they knew that McKenzie, as a lay person with

only a high school diploma, could not possibly *"voluntarily, knowingly and validly"* assent to an arbitration clause that SETA's own H/R director *"wouldn't know unless somebody knowledgeable in the law explained [it] to her."* When they went so far as to suggest to the district court that McKenzie's clerical functions in the preparation of employee handbooks with a former employer indicated her knowledge of the arbitration clause, they knew they were misleading and defrauding the court. *Having concealed what they knew to be true and having represented what they knew to be untrue to the district court, SETA and its counsel obtained the Order of August 22, 1997 compelling arbitration by fraudulent representations and fraudulent concealment perpetrated upon the court.*

With the arbitrator concluding that the validity of the arbitration clause is not an issue before him, the hearings were concluded. On January 7, 1999, the arbitrator's award was delivered to McKenzie. He dismissed her claims by imposing on her a burden of proof beyond the realm of civil or criminal law mandates and upon disregard of the law he knew:

> **"Absent *direct evidence of discriminatory intent* and absent proof that [McKenzie's] pregnancy, as distinct from excessive absenteeism, was the reason for her separation, [her] - sic - PDA [Pregnancy Discrimination Act] claims must be rejected."**

Yet, the statute cited and proffered to the arbitrator provides *"an unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice."* Title VII, 42 U.S.C. § 2000e-2(m). And, as Chief Judge Richard Posner noted:

"One kind is evidence that can be interpreted as an *acknowledgment of discriminatory intent* by the defendant or its agents [citations omitted]. Such evidence *is indeed direct evidence* as distinct from circumstantial; and ***since intent to discriminate is a mental state and mind reading is not an acceptable tool of judicial inquiry,...*** [*Direct evidence*] *is the equivalent of an admission of guilt by the defendant.*" Troupe v. May Dept. Stores Co., *20 F.3d 734, 736-7 (7th Cir. 1994).* And this was an authority the arbitrator purportedly relied on!

C. Post-Arbitration District Court Proceedings

On March 8, 1999, *within 90-days from the date of the award,* McKenzie filed with the district court her "First Motion to Rescind the Order Compelling Arbitration, Vacate the Arbitral Award and be Granted her Constitutional Demand for Jury Trial" [*"First Motion."*] She premised her motion on *two independent statutory jurisdictional bases.* First, she sought relief under the specific provisions of *Rule 60(b)(3) of the Federal Rules of Civil Procedure ["F. R. Civ. P."]* which grants *relief from judgment or order obtained by fraud committed upon the Court,* in this case SETA's procurement of the Order compelling arbitration by fraudulent representations of material facts to the court and fraudulent concealment of material facts from the court. She also sought relief under the FAA, 9 U.S.C. § 10(a)(1) *cum* Kentucky River Mills v. Jackson, *206 F.2d 111, 112 (6th Cir. 1953),* cert. denied *346 U.S. 887, 74 S.Ct. 144 (1953)* holding:

"[In] action upon arbitration award by party against whom award is made can raise any

> defense - sic - (including fraud and undue means) it could have raised under statutory proceeding for order directing arbitration to proceed in accordance with contract, 9 U.S.C. §§ 1 et. seq."

McKenzie also moved the district court to grant her a hearing on her *First Motion* per dictums of settled law:

> "It is beyond question that a federal court may investigate a question as to whether there was fraud in the procurement of a judgment. *Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 66 S.Ct. 116.* ... **This is to be done in adversary proceedings as in the case before us.** *See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997; ... Sprague v. Tictonic National Bank, 307 U.S. 161, 59 S.Ct. 777; United States v. Throckmorton, 98 U.S. (8 Otto) 61, 25 L. Ed. 93." Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985).*

While her *First Motion* was pending, McKenzie also filed her "Second Motion to Vacate the Arbitral Award Rendered in Favor of the Defendant and be Granted Her Constitutional Demand for Jury Trial" [*"Second Motion"*] on April 6, 1999, *within 90-days from the date of the award.* In her motion, she enunciated the arbitrator's imperfect execution of his powers, his evident partiality and misbehavior, *his manifest disregard of the law he knew and imposition on her a burden of proof never envisioned by any civil or criminal law, vide* the FAA, 9 U.S.C. § 10. She noted, upon the record of the evidence proffered to the Court, the fulfillment of each element

of her causes of action including disparate treatment and discharge from her job to be replaced by a non-pregnant female despite SETA's claim that it laid her off because of lack of work. She proffered evidence that, contrary to Ranvir Trehan's, SETA's president and owner, initial claim that he did not know she was pregnant when he terminated her, that he did, in fact, know of her pregnancy and pregnancy-related illnesses but that, and we quote his testimony:

> **"Sir, I come from a culture where you do not delve into the women's bodies. Somehow, you may not understand that. I come from a culture where that does not happen very much. And I am not comfortable with women talking to me about those kinds of things (i.e. their pregnancies, miscarriages, illnesses or their uniquely female problems)."**

Although, unbeknown to her, McKenzie was subjecting her second level supervisor and ultimate boss, Ranvir Trehan, to cultural discomfort in explaining to him the complications of her pregnancy and related medical conditions, he had no cultural barriers in learning about the disabling medical conditions of his male employee who he declared: *"(w)e accommodated him for a very long period of time. When I say 'very long' over six months."* Her claims were sustained by what may well be clear and convincing standard.

By its Order and Memorandum Opinion, filed March 29, 1999, *[pages A10-A13 of the APPENDIX]*, the district court, presided by the Honorable Judge Claude Hilton, denied McKenzie's *First Motion* without affording her even a routine motion hearing and without touching upon the evidence of fraud she presented tangent to the Rule 60(b)(3) relief she requested. Instead of addressing the specific evidence of fraud McKenzie

proffered upon the record of the arbitral proceedings on October 24, 1998, the court reached its conclusion by equating her *First Motion* with her April 9, 1998, motion seeking resumption of the judicial proceedings. *The record was clear that the evidence of fraud presented to the district court was discovered over six months after the April 9, 1998 motion.*

The district court also denied McKenzie's *Second Motion* by its Order and Memorandum filed April 30, 1999, [pp. A14-A17 of the APPENDIX.] The rationale for the denial were the 'federal policy favoring arbitration' and the interest in preserving "the binding" finality of the arbitration process.

Meantime, on April 21, 1999 *(one hundred and three days after the issuance of the arbitral award)*, SETA filed its Motion to Confirm the Arbitration Award (at page A18 of the Appendix.*)*

D. The Appellate Proceedings

On April 28, 1999, McKenzie noticed and filed her appeal from the district court Order of March 29, 1999 denying her *First Motion* and the Order of August 22, 1997 compelling arbitration. She did so, pursuant to F.R.A.P. Rule 4(a), within 30 days from the date of the order denying the Rule 60(b)(3), F. R. Civ. P. relief to rescind the Order compelling arbitration.

On May 5, 1999, five days after the denial of her *Second Motion*, McKenzie amended her Notice of Appeal and filed her appeal from the Order of April 30, 1999 denying vacateur of the arbitral award.

While the appellate proceedings were in progress and aware of the proceedings as well as the absence of any accord between the parties for judicial confirmation of the award (mandate of FAA, 9 U.S.C. § 9), the district court [by Judge Hilton] granted SETA's motion to confirm the arbitration award by its Order filed May 7, 1999. McKenzie did not notice an

appeal from this post-appeal order of the district court.

Briefing schedules were established by order of the Court of Appeals and McKenzie filed her Opening Brief and Joint Appendixes (consisting of 1135 pages) on June 21, 1999 as scheduled. On July 23, 1999, eighteen days from the due date for its Answering Brief, SETA filed its *"Motion to Dismiss Portion of Appeal for Lack of Jurisdiction."* Upon filing of this defense Motion, the Court suspended the Briefing schedules.

The premise for SETA's Motion was the argument that the district court Order of March 29, 1999, denying McKenzie's *First Motion,* and the Order of April 30, 1999, denying McKenzie's *Second Motion*, are not final decisions within the purview of the FAA, 9 U.S.C. § 16, and that the only final decision appealable under the statute is the Order confirming the arbitration award which McKenzie did not appeal. However, *SETA conceded in its motion appellate jurisdiction with respect to McKenzie's appeal from the August 22, 1997 district court Order compelling arbitration* stipulating as follows:

> **"Appellee SETA Corporation *is not moving* to dismiss the appeals as to the August 1997 Order. As explained below, section 16 of the Federal Arbitration Act generally precludes review of orders staying litigation pending arbitration proceedings *'until after the arbitration has gone forward to a final award.'* *American Cas. Co. v. L-J, Inc., 35 F.3d 133, 135 (4th Cir. 1994) (internal citations and quotations omitted.)"***

As fully amplified in the arguments below, McKenzie opposed SETA's motion proffering, inter alia, that:

[A] The Court's jurisdiction over her appeal from the Order of March 29, 1999, denying her *First Motion*, is

independent of any provision of the FAA inasmuch as it seeks relief under Rule 60(b)(3) of the F. R. Civ. P. and is subject to appellate review under the Court's plenary jurisdiction pursuant to 28 U.S.C. §§ 1291 *cum* 1294(1).

[B] Even if McKenzie's appeals from both orders of the lower court were controlled by the FAA, SETA's arguments are belied by the clear and specific language of the statute itself. FAA, 9 U.S.C. § 16 which defines appellate jurisdiction reflects the Congressional intent to create separate and parallel appeals avenues distinguished between parties favored by and parties aggrieved (disfavored) by arbitral awards. Thus, *FAA § 16(a)(1)(D)* provides specifically for *appeal from an order "confirming or denying confirmation of an award or partial award."* Independent of this provision, *FAA § 16(a)(3)* provides for appeal from any order which is *"a final decision with respect to an arbitration that is subject to this title."* McKenzie's appeals from the orders below are "final decisions" as envisioned by 9 U.S.C. § 16(a)(3).

[C] In lodging her appeals, McKenzie detrimentally relied upon the published opinion of the Fourth Circuit which unequivocally asserts jurisdiction to review "as a final judgment" all district court orders under 9 U.S.C. § 10; dicta: ***"We then (i.e. after district court denial of motion to vacate adverse arbitral award) may review as a final judgment any district court action pursuant to 9 U.S.C. § 10."*** Humphrey v. Prudential Securities, Inc., *4 F.3d 313, 319 (4th Cir. 1993).* Further, McKenzie enunciated various decisions of several Circuit Courts which exercise jurisdiction over appeals from denial of motions to vacate arbitral awards.

By its Order filed February 23, 2000, the Court of Appeals granted SETA's motion and dismissed McKenzie's appeals from the district court Orders of March 29, 1999 and April 30, 1999. It offered no explanation. Said Order of the Court appears at page A7 of the Appendix hereto.

Upon partial dismissal of McKenzie's appeals, the Court established a new Briefing Schedule with respect to the remaining portion of the appeal, i.e. the appeal from the district court Order of August 22, 1997, compelling arbitration.

SETA filed its Answering Brief as scheduled. Reversing its earlier jurisdictional concession, it argued that the Appeals Court does not have jurisdiction to review the appeal from the Order compelling arbitration because the order is interlocutory and the only final order the Court may review under the FAA is the May 7, 1999 district court order confirming the arbitration award which McKenzie did not appeal.

As more fully propounded below in the arguments, McKenzie defended her appeal upon the language of the FAA, prior decisions of the Court as well as the holdings of other Circuits. She reiterated her claim to relief independent of the FAA and as envisioned by Rule 60(b)(3) of the F. R. Civ. P. which, thus, brings her appeal within the plenary jurisdiction of the Court pursuant to 28 U.S.C. § 1291.

By *per curiam* opinion rendered December 8, 2000, the Court dismissed McKenzie's remaining appeal concluding that the Order compelling arbitration is interlocutory and "is not by itself an appealable order" and the only final order subject to appellate review is the order confirming the arbitration award. [Please see pages A1 - A5 of the Appendix hereto.]

On December 21, 2000, McKenzie filed her Petition for Panel Rehearing in which she enunciated that her claim for relief by her *Second Motion* under F. R. Civ. P., Rule 60(b)(3) for fraud committed upon the Court in the procurement of the August 22, 1997 Order compelling arbitration is within the plenary jurisdiction of the Court pursuant to 28 U.S.C. § 1291 *cum* §1294(1). By Order filed January 4, 2001, the Court denied the Petition for Rehearing [please see page A6 of the Appendix hereto]. This Petition ensued.

ARGUMENTS FOR ALLOWANCE OF WRIT OF CERTIORARI

A. The Jurisdictional Issues Addressed by the Court of Appeals Involve Important Questions of Federal Law Which Have Not Been, But Should be, Settled by this Court

As this Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991), Green Tree Financial Corp. v. Randolph, 531 U.S. __ (2000)* and its recent decision in *Circuit City Stores v. Adams, No. 99-1379, decided March 21, 2001, ___ U.S. ___, ___ S.Ct. ___ (2001)* reflect, arbitration has not only become an integral part of our nation's civil justice system but is also assured a profoundly expanded role. For the functioning of the arbitration system as intended and effectively in its expanded role, the supervision and control by the Federal judiciary as envisioned by the FAA, 9 U.S.C. § 1, et. al., is even more so important. Therefore, this Court's disposition of the issues of appellate jurisdiction herein would resolve with finality the scope of supervision and control the Appeals Courts must exercise to ensure that the arbitration process does not go amok of Congressional goals and intent.

McKenzie respectfully submits that the Opinion below unduly restricts the powers of the Courts of Appeals, is inconsistent with the clear language of the statute (the FAA), is not in accord with the Congressional scheme and intent underlying the FAA and is unwarranted by settled principles of statutory interpretation. Furthermore, as enunciated below in Part B, the Opinion is in conflict with a relevant decision of this Court and the decisions of other United States courts of appeals on the same important appellate jurisdictional issue.

Under the FAA, ***Congress*** has made clear its intent to subject the arbitration process and arbitral awards to judicial

review and scrutiny both at district court and court of appeals levels. In so doing, it ***has created a parallel scheme of judicial review upon dichotomy of actions to be taken by two distinct parties: Parties disfavored or aggrieved by arbitral awards and parties favored by awards. The procedures to be followed by the two parties are parallel, distinct and separate from each other as the statutory scheme of the FAA clearly connotes.***

Thus, the actions the party aggrieved by an arbitral award may take both at the district and appellate court levels are addressed by provisions uniquely crafted for the purpose. The first of this provisions is FAA § 12 which defines a specific period of time for what the aggrieved party may do. Hence, it provides: *"Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney* ***within three months after the award is filed or delivered."*** And this time frame is deemed *a "statute of limitation"* that forecloses any action by the aggrieved party regardless of actions which may be undertaken by the party favored by the award. To wit, it has been held:

> **"Once the three-months period after arbitration award is filed or delivered during which the Federal Arbitration Act requires that motions to vacate be served within 9 U.S.C. § 12 has expired, attempt to vacate arbitration award cannot be made *even in opposition to a motion to confirm award."*** *Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986). See also Florasynth, Inc. v. Pickholz, 750 F2d. 171 (2nd Cir. 1984).*

Likewise, Congress has distinctly defined the grounds upon which the aggrieved party may move to seek vacateur of

an award. These are provided in § 10 of the FAA and demonstrate the intent of Congress to ensure that the arbitration process would not run amok of the standards of integrity and fairness the civil justice system requires. They include bases that attempt to squelch "corruption, fraud and undue means" in the award process, those that seek to supervise and control arbitrators' conduct including "evident partiality," "imperfect execution" of arbitral powers, or "any other misbehavior by which the rights of any party have been prejudiced" - including, of course, manifest disregard of law or evidence.

By contrast to and as distinct from the actions a party aggrieved by an award may seek to obtain the jurisdictional control and supervision of the district courts, Congress has separately and independently provided for district court action that may be taken by the party favored by an award. Hence, § 9 of the FAA instructs:

> ***"If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration***, and shall specify the court, then ***at any time within one year after the award is made*** any party to the arbitration may apply to the court so specified for an order confirming the award ...."

As is evident from this provision, the ***dichotomy*** Congress has intended and defined by clear mandates of law between district court actions available for parties aggrieved by arbitral award (such as the Petitioner) and those available for parties favored by an award (such as SETA) could not be more profound. *The rights granted to the party disfavored by an award for district court action to vacate the award under § 12 of the FAA and upon the grounds provided for in § 10 of the*

*Act are **statutory** in nature.* By contrast, the district court action a party favored by an award may seek is not a matter of statutory right but is ***contractual*** in nature, i.e. such a party may move to confirm the arbitration award *only* ***"(i)f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award,"*** vide, FAA § 9. It is noted the district court was made aware that no such agreement exists between SETA and McKenzie!

Consistent with the parallel scheme envisioned, the FAA § 9 also stipulates a time frame the party favored by the award has to move to confirm the award - "any time within *one year* after the award is made" - as contrasted by the *three-month* statute of limitation imposed on the disfavored party to move to vacate the award. And the confirmation proceeding itself "is intended to be summary: confirmation can only be denied if an award has been corrected, vacated or modified in accordance with the Federal Arbitration Act." Taylor, *op. cit., at 255.*

The intent of Congress to create ***a parallel scheme of appellate procedures*** for parties aggrieved by and parties favored by arbitration awards is no less evident in the provisions of the FAA. To this end, § 16 of the FAA provides in relevant parts:

> "(a) An appeal may be taken from -
> "(1) an order -
> "(D) confirming or denying confirmation of an award or partial award, or
> "(E) modifying, correcting, or vacating an award.
> "(3) a final decision with respect to an arbitration that is subject to this title."

As with the *parallel procedures* designed for district court proceedings, Congress has also devised ***parallel***

jurisdictional authority for redress to be sought in the United States courts of appeals. Thus, appeals from district court actions pertaining to *contract-based confirmation proceedings* initiated by the party favored by arbitral award under § 9 of the FAA are subject to appellate jurisdiction and review pursuant to § 16(a)(D) of the FAA. On the other hand, appeals from district court orders upon motions to vacate adverse arbitral award by parties aggrieved by arbitral award are subject to appellate jurisdiction and review as "final decisions" within the purview of § 16(a)(3) of the FAA - dicta: *"We ... review as final judgment any district court action pursuant to 9 U.S.C. § 10."* Humphrey v. Prudential Securities, Inc., *4 F.3d 313, 319 (4th Cir. 1993).*

Consistent with the *parallel procedures* designed by Congress and defined by clear law for parties aggrieved by an arbitral award, McKenzie filed with the district court her motions to vacate the arbitral award upon the grounds envisioned by § 10 of the FAA and within the three-months statutory period prescribed by § 12 of the Act. Per F.R.A.P. Rule 4, within 30-days from the final judgments of the district court denying her motions, she noticed and docketed her appeals therefrom for review under the jurisdictional authority of the Appeals Court not only under the parallel appellate procedure established by § 16(a)(3) of the FAA but also, as explained in Part C (below), under the plenary jurisdiction of the Court pursuant to 28 U.S.C. § 1291 *cum* § 1294(1).

Despite such clarity of law and procedure, the Appeals Court dismissed Petitioner's appeals upon the premise:

> "In an earlier order we dismissed McKenzie's appeal from the orders denying her motions to vacate the arbitration award. Those orders are not designated as appealable under the FAA, nor do they represent *a 'final decision'* under the

> Act. *See 9 U.S.C. § 16(a)*.... The one remaining order McKenzie seeks to challenge, *the interlocutory order granting the motion to compel arbitration, is not by itself appealable under the FAA*. .... we are without jurisdiction.
>
> "We would have jurisdiction *if McKenzie had appealed from the confirmation order*. ...."
> [Page A5 of the Appendix, emphasis added.]

Not only that the judgment of the Court is in error for its misapprehension of the intent of Congress to create parallel and independent judicial procedures for parties favored and parties disfavored by arbitral awards to pursue judicial remedies (as heretofore enunciated), but has also thrown the FAA into a state of confusion requiring this Court's exercise of supervisory power and resolution of the jurisdictional issues with finality.

The decision suggests that the only "final judgment" appealable under the FAA is the confirmation order. Yet, per clear language of § 16(a)(1)(D), the order "confirming or denying confirmation of an award or partial award" is precisely what the FAA *does not* refer to as *"final judgment."* It only defines it as an appealable order and not "a final judgment" envisioned by § 16(a)(3).

The judgment below is also erroneous because it *subjects* parties aggrieved by arbitral awards and seeking ***statutory redress*** under §§ 12 *cum* 10 of the FAA *to subservience* to the actions the party favored by the award may or may not choose to take based upon ***contract-based rights***. In this regard, the judgment of the Court has reversed the *parallel judicial procedures* established by Congress and made the statutory rights of the disfavored party *dependent* on the contract-based rights of the favored party. It does not require much craftiness for the party favored by an arbitral award to

destroy the statutory redress afforded to the opponent. Considering that such a party is granted a full year from date of the award to move to confirm that award {*vide* § 9 of the FAA} as opposed to the aggrieved party who must act upon his/her statutory rights within three-months, it is within the power and pure discretion of the favored party to move to confirm the award well after the opponent has exercised appellate rights to redress district court denial of motion to vacate. This would represent not an issue of "final judgment" but the grant of a *"veto power"* to one party in the proceedings!

No less erroneous, perhaps even puzzling, is the conclusion of the Appeals Court that it has no jurisdiction to review McKenzie's appeal from the August 22, 1997 order compelling arbitration. While it is true that orders to compel arbitration are interlocutory and, thus, not subject to immediate appeal [*vide* § 16(b) of the FAA], the Court itself has recognized jurisdiction to review such appeals ***"after the arbitration has gone forward to a final award"*** *American Cas. Co. of Reading Pennsylvania v. L. J., Inc., 35 F.3d 133, 136-137 (4th Cir. 1994). The record leaves no doubt that McKenzie's appeal from the Order was lodged after the arbitration has proceeded to final award!*

It is indubitable that the Court of Appeals has jurisdiction granted by the FAA to review each appeal McKenzie lodged from the three orders of the district court. The dismissal of her appeals for lack of jurisdiction represents substantial departure from the FAA's clear mandates, the underlying intent of Congress, and fundamental justice in an exceptionally significant area of federal law.

Even more important, however, is the extent to which the judgment below conflicts with a unanimous decision of this Court as well as the decisions of several United States courts of appeals. This submission is amplified below.

B. The Judgment of the Appeals Court is in Direct Conflict with the Unanimous Decision of this Supreme Court in *First Options of Chicago, Inc. v. Kaplan, 513 U.S. 938 (1995)* as well as the Decisions of Other Circuits

In *First Options of Chicago, Inc. v. Kaplan, 513 U.S. 938, 115 S.Ct. 1920 (1995)* this Court unanimously held:

> "Court of Appeals should accept district court's findings of fact regarding ***agreement to submit issue to arbitration*** if not 'clearly erroneous' but decide questions of law *de novo*, ***regardless of whether district court has confirmed or denied confirmation of arbitration award.***"

By her *First Motion*, McKenzie sought to rescind the Order of August 22, 1997, compelling arbitration because the district court's findings of fact are clearly erroneous and the conclusions of law under Virginia's law are substantially flawed. There has never been a valid arbitration contract between SETA and McKenzie to arbitrate any dispute, any matter. Moreover, McKenzie claimed relief under Rule 60(b)(3) of the F. R. Civ. P. impelled by compelling, clear and convincing evidence that SETA obtained the Order by fraud and deceit perpetrated upon the district court and involving an officer of the court.

Her appeals from this district court order and the Order of March 29, 1999 (denying vacateur) are beyond the realm of inquiry as to *"whether the district court has confirmed or denied confirmation of the arbitration award."* *Kaplan* instructs so and with sound reason.

As McKenzie has pleaded in her motions, briefs and petitions before the courts below, there is no 'federal policy favoring arbitration' that can be superimposed to subject her to

arbitration absent a knowing and voluntary accord to submit to arbitration. The duty to arbitrate a dispute flows from a voluntary and knowing agreement which, in turn, is determined by applying "ordinary state-law principles that govern the formation of contracts." *Kaplan, op. cit., 514 U.S. 943; see also Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 1255 (1989)* - dicta: "courts to enforce privately negotiated agreements to arbitrate, like other contracts, according to their terms;" *Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63, 115 S.Ct. 1212, 1218-1219 (1995); Dean Witter Reynolds, Inc. v. Bird, 470 U.S. 213, 219; 105 S.Ct. 1238, 1241 (1985), inter alia.*

Whereas the appeals before the Court pertain to McKenzie's challenges that she was deprived of her jury trial rights in the absence of a valid contract to arbitrate her dispute, it would elevate form over substance to conclude that the status of the award of the arbitration she challenges determines the fate of her appeals and the jurisdiction of the Court. The dismissal of McKenzie's appeals because appeal was not lodged from the order of the district court confirming the award issued during the pendency of the appeals before the Appeals Court is in direct conflict with the *Kaplan* ruling and the *raison d'etre* of the decisions of this Court herein cited.

The Courts of Appeals are specifically instructed and are vested jurisdiction to review district court orders on arbitrability issues by the "clearly erroneous" standard as to factual findings and *de novo* as to conclusions of law "**regardless** of whether district court has confirmed or denied confirmation of arbitration award." This is the unanimous tenet of this Court. Since the subject issue is to be reviewed independent of the presence or absence of confirmation awards, whether or not McKenzie appealed the district court order confirming the arbitration award is entirely irrelevant to the jurisdiction of the Appeals

Court to review her appeals. The decision below is in direct conflict with this Court's decisions as herein proffered.

It is also of moment here to note that the Courts of Appeals routinely exercise jurisdiction over district court orders denying motions to vacate arbitral awards as in this case. To wit, inter alia:

The Third Circuit in *Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1505 (3rd Cir. 1994)* reviewing the denial of motion to vacate arbitral award and the confirmation of the award, reversed the district court's order confirming the award and directed vacateur of award against appellants - all within the appellate jurisdiction the Court under the FAA.

The Ninth Circuit in *Western Employers Ins. V. Jefferies & Co., 958 F.2d 258 (9th Cir. 1992)* reviewing district court denial of motion to vacate arbitral award, reversing and ordering vacateur. The Fifth Circuit in *McILROY v. PaineWebber, Inc., 989 F.2d 817, 819 (5th Cir. 1993)* reviewing *de novo*, within its appellate jurisdiction, district court order denying motion to vacate or modify arbitration award and affirming. The Seventh Circuit *In re VMS Securities Litigation, 21 F.3d 139 (7th Cir. 1994)* reviewing district court order enjoining enforcement of arbitration award but refusing to vacate award.

The writ of certiorari should be granted.

C. McKenzie's Appeal from District Court Denial of Her Motion for Relief Under Rule 60(b)(3) of the F. R. Civ. P. is Within the Plenary Jurisdiction of the Appeals Court to Review

The gravamen of McKenzie's *First Motion* was the relief she sought under Rule 60(b)(3), F. R. Civ. P., predicated on clear and convincing evidence, that SETA obtained the August 22, 1997, district court order compelling arbitration by fraud and deceit committed upon the court.

McKenzie asserted her claim acutely aware that "fraud on the court is a serious allegation ... involving corruption of the judicial process itself" *Cleveland Demolition Co., Inc. v. Azcon Scrap Corp., 827 F2d 984, 986 (4th Cir. 1987).* And she is impelled by the strength of her evidence that she was deprived of the free exercise of her Seventh Amendment right to jury trial because of extrinsic fraud perpetrated upon the court and involving a member of the court.

In apparent and clear abuse of discretion, the district court never touched upon her evidence. Indeed, the court below did not even grant her a routine hearing on her motion despite her request to be heard. Yet, controlling law instructs that such allegations be adjudicated in adversarial proceedings: "It is beyond question that a federal court may investigate a question as to whether there was fraud in the procurement of a judgment. *Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 66 S.Ct. 116. ...* **This is to be done in adversary proceedings as in the case before us.** *(Citations omitted)" Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985). Also Great Coastal Express, Inc. v. International Brotherhood of Teamsters, etc. 675 F.2d 1349, 1352-53 (4th Cir. 1982).*

Nevertheless, the district court did point out, in its Order and Memorandum filed March 29, 1999, that it was acting under F. R. Civ. P. Rule 60(b)(3) in denying McKenzie's motion: "The plaintiff has the burden *under Fed. R. Civ. P. [Rule] 60* to prove that there was misconduct on the part of the defendant by clear and convincing evidence ...." [Page A12, Appendix].

Thus, in filing her appeal from this Order of the district court, McKenzie left no doubt that she was invoking the jurisdictional authority of the Court of Appeals under ***28 U.S.C. § 1291*** providing: ***"(t)he courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States."*** She cited this statutory authority as her jurisdictional basis on her docketing statement, indicated

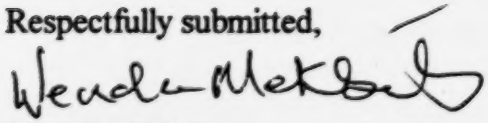
it as jurisdictional basis in her briefs and petitions before the Court. And, there is nothing to suggest that this statutory authority of the Court is subsumed by the FAA with respect to the relief McKenzie sought under Rule 60(b)(3). The Court itself has acted within said on appeal from district court action on motion for Rule 60(b)(3) relief; *see Square Construction Co v. Washington, etc., 657 F2d 68, 72 (4th Cir. 1981).*

It is apparent that the dismissal of McKenzie's appeals, at least with respect to her appeals from the August 22, 1997 Order and the Order of March 29, 1999, denying equitable relief under F. R. Civ. Rule 60(b)(3), is not supported by lack of jurisdiction. Considering McKenzie's gargantuan endeavors to be heard on her appeals pursuant to 28 U.S.C. 1291, it cannot be suggested that the dismissal of the appeals was simple error or omission. Writ of Certiorari should be granted to remedy the substantial departures from substantive law.

CONCLUSION

WHEREFORE, for the reasons heretofore enunciated, the Petitioner respectfully requests that her Petition for a Writ of Certiorari be GRANTED for the ultimate purpose of remanding her appeals for review on merits.

Respectfully submitted,



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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ANGELA G. MCKENZIE,
Plaintiff-Appellant,

v.

SETA CORPORATION,
Defendant-Appellee.

No. 99-1576

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-97-1038)

Argued: November 3, 2000

Decided: December 8, 2000

Before WIDENER, MICHAEL, and MOTZ, Circuit Judges.

Dismissed by unpublished per curiam opinion.

COUNSEL

ARGUED: Wendu Mekbib, LAW OFFICES OF WENDU MEKBIB, Vienna, Virginia, for Appellant. Richard Mark Dare, REED, SMITH, HAZEL & THOMAS, L.L.P., Falls Church, Virginia, for Appellee. **ON BRIEF:** Michael C. Montavon, MICHAEL C. MONTAVON, P.C., Fairfax, Virginia, for Appellee.

On October 2, 1996, McKenzie filed a formal charge with the Fairfax County Human Rights Commission, alleging sex and pregnancy discrimination in SETA's decision to terminate her. The Human Rights Commission issued her a notice of right to sue. McKenzie subsequently filed this action in federal court, alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, wrongful discharge, intentional infliction of emotional distress, and breach of contract. SETA moved to compel arbitration on the ground that McKenzie had signed an employment application that included an arbitration clause. The application provided:

> I understand and agree to the following:
>
> . . . .
>
> . . . I understand that all controversies, claims, and/or disputes arising out of the termination of my employment with SETA Corporation shall be settled exclusively through binding arbitration.

The district court granted SETA's motion and stayed the case pending the completion of arbitration. The parties proceeded with arbitration, and on January 6, 1999, the arbitrator dismissed all of McKenzie's claims against SETA. In particular, the arbitrator concluded that McKenzie had not proven that SETA terminated her because of her pregnancy. SETA was required to pay the arbitrator's compensation and the other expenses of arbitration.

At this point, the procedural history of this action becomes important because the timing and nature of certain motions and orders in district court affect whether we have jurisdiction to hear this appeal. On March 8, 1999, McKenzie filed a motion to vacate the arbitral award, arguing that SETA fraudulently induced her to sign the employment application by concealing its (SETA's) knowledge that nonlawyers do not understand arbitration clauses. The district court denied the motion on March 29, 1999, reasoning that SETA's conduct did not rise to the level of fraud. On April 6, 1999, McKenzie filed a second motion to vacate the arbitral award, claiming that the arbitrator displayed partiality and a manifest disregard for the law by requiring direct evidence of SETA's discriminatory intent. On April 21,

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1999, before the district court ruled on the second motion to vacate, SETA moved to confirm the arbitral award. On April 28, 1999, McKenzie noted an appeal from the district court's March 29, 1999, order denying her first motion to vacate and from the court's August 22, 1997, order compelling arbitration. On April 30, 1999, the district court denied McKenzie's second motion to vacate, concluding that she had failed to show actual bias on the part of the arbitrator and that the arbitrator's misapplication of the law is not a ground for vacating his award. On May 5, 1999, before the district court ruled on SETA's motion to confirm, McKenzie filed an amended notice of appeal, noting an appeal from the order denying her second motion to vacate. Two days later, on May 7, the district court entered an order confirming the arbitral award. McKenzie did not take an appeal from the confirmation order.

After McKenzie filed her briefs in our court, SETA moved to dismiss, for lack of jurisdiction, McKenzie's appeal insofar as it challenged the orders denying the motions to vacate. SETA argued that these orders are not appealable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. The FAA provides that an appeal may be taken from, among other things, an order "confirming or denying confirmation of an award or partial award," an order "modifying, correcting, or vacating an award," and "a final decision." 9 U.S.C. § 16(a). A final decision is one that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). SETA argued that the orders *denying* the motions to vacate do not fall into any of the enumerated categories, nor are they final decisions because the litigation here continued and the district court still had something to do, that is, confirm the arbitral award. Therefore, according to SETA, the district court's "final decision" was rendered on May 7, 1999, when it confirmed the arbitral award. The confirmation order was an appealable order, but McKenzie failed to take an appeal from that order. We accepted SETA's argument and dismissed McKenzie's appeal with respect to the two orders denying the motions to vacate. *See McKenzie v. SETA Corp.*, No. 99-1576 (CA-97-1038) (4th Cir. Feb. 23, 2000). Accordingly, all that remains in the present appeal is McKenzie's challenge to the district court's order compelling arbitration.

II.

McKenzie asserts that she is entitled to a trial by jury and that the district court should not have ordered the parties to resolve their dispute through arbitration. She first argues that the arbitration clause only said that she "understands" that all disputes are to be settled by arbitration, but the clause did not say that she "agrees" to such arbitration. Second, McKenzie claims that SETA fraudulently induced her to sign the employment application by hiding from her the company's knowledge that nonlawyers do not understand the meaning of arbitration. SETA responds on the merits, but it also argues that McKenzie's appeal should be dismissed because she failed to appeal from the confirmation order, the only appealable order in this case.

In an earlier order we dismissed McKenzie's appeal from the orders denying her motions to vacate the arbitration award. Those orders are not designated as appealable under the FAA, nor do they represent a "final decision" under the Act. *See* 9 U.S.C. § 16(a). We also have no choice except to dismiss the remaining portion of McKenzie's appeal. The one remaining order that McKenzie seeks to challenge, the interlocutory order granting the motion to compel arbitration, is not by itself an appealable order. *See id.* § 16(b)(3). In order to challenge it, McKenzie must have noted an appeal from a final decision or from an order designated as appealable under the FAA. *See F.C. Schaffer & Assocs. v. Demech Contractors, Ltd.*, 101 F.3d 40, 42-43 (5th Cir. 1996) ("[T]his court lacks jurisdiction to review the district court's decision regarding the arbitrability of the parties' dispute until there is an appealable, *i.e.* final, order."). Because there is no appealable order before us, we are without jurisdiction.

We would have jurisdiction if McKenzie had appealed from the confirmation order. At the time she filed her amended notice of appeal on May 5, 1999, she knew that SETA's motion to confirm the arbitral award was pending. Nevertheless, she chose to proceed with her appeal at that time. Two days after McKenzie filed her amended appeal, the district court issued its final decision, an order confirming the award. Because McKenzie did not note an appeal from that order, we must dismiss the remainder of this appeal for lack of jurisdiction.

DISMISSED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 4, 2001

No. 99-1576
CA-97-1038

ANGELA G. MCKENZIE

Plaintiff-Appellant

v.

SETA CORPORATION

Defendant-Appellee

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK

FILED: February 23, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1576
(CA-97-1038)

ANGELA G. MCKENZIE,

Plaintiff-Appellant,

versus

SETA CORPORATION,

Defendant-Appellee.

ORDER

The Appellee has moved to dismiss the appeal with respect to the orders entered by the district court on March 29, 1999, and April 30, 1999. The Court grants the motion. The Appellant has moved to expedite consideration of the Appellee's motion for partial dismissal. We deny the motion as moot.

Entered at the direction of Judge Traxler, with the concurrence of Judge Michael and Judge King.

For the Court

/s/ Patricia S. Connor
Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE **Plaintiff,**	)	
v.	)	**C.A. No. 97-1038-A**
SETA CORPORATION, **Defendant.**	)	

ORDER

This matter is before the Court on Defendant SETA Corporation's Motion to Dismiss and/or to Stay Action Pending Arbitration and to Compel Arbitration. Having considered Defendant's Motion and memorandum in support thereof, Plaintiff's response, and oral argument, the Court finds that the arbitration clause in Plaintiff's employment application is valid and pertains to a matter subject to arbitration. Accordingly, it is

ORDERED that the case is **STAYED** for one hundred eighty days (180) during which time the case shall be arbitrated.

It is further **ORDERED** that the parties shall consult the American Arbitration Association within thirty (30) days from the date of this order to identify and select an arbitrator for the case.

It is further **ORDERED** that the parties shall submit to the Court a joint status report sixty (60) days from the date of this order, and every sixty (60) days thereafter until the stay expires.

The clerk is **DIRECTED** to send a copy of this order to counsel for the parties.

signed Raymond P. Jackson
UNTIED STATES DISTRICT JUDGE

Date: August 22, 1997

IT is so **ORDERED.**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE **Plaintiff,**	)	
v.	)	**C.A. No. 97-1038-A**
SETA CORPORATION, **Defendant.**	)	

ORDER

This motion comes before the Court the plaintiff's motion to rescind the Order compelling arbitration, vacate the arbitral award, and be granted her constitutional demand for jury trial. For reasons stated in the accompanying Memorandum Opinion, it is hereby,

ORDERED that plaintiff's motion to rescind the Order compelling arbitration, vacate the arbitral award, and be granted her constitutional demand for jury trial is DENIED.

signed Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

March 29, 1999

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 97-1038-A**
	)	
SETA CORPORATION,	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This matter comes before the Court the plaintiff's motion to rescind the Order compelling arbitration, vacate the arbitral award, and be granted her constitutional demand for jury trial.

The plaintiff filed suit in this Court on July 2, 1997. In her complaint, she asserted that she was discriminated against in her employment. Based on an arbitration clause that was contained in the defendant's employment application forms, signed by the plaintiff, the Court ruled in favor of SETA to compel arbitration. The plaintiff then filed with this Court a motion for resumption of the judicial proceeding upon termination of the stay of proceedings effective April 22, 1998. This motion was denied by this Court, finding there to be no basis for disturbing the ongoing arbitration.

The Arbitration commenced on August 15, 1998 and the parties were given a full hearing on Plaintiff's claims. The Arbitrator issued an award in favor of the defendant on January

7, 1999, however, required the defendant to pay the costs of the arbitration since the defendants had invoked the arbitration clause.

Plaintiff now comes forward and argues under her motion to rescind the Order compelling arbitration, vacate the arbitral award, and be granted her constitutional demand for jury trial alleging the defendant committed fraud on this Court when it moved this Court to compel arbitration. Plaintiff bases this allegation on the facts that the plaintiff only has a high school diploma, thus, not sophisticated enough to understand an arbitration clause in a contract, and that the defendant committed fraud on this Court when it suggested to this Court that the arbitration proceedings would be less expensive and shorter than Court litigation.

The plaintiff in this motion does not set forth a sufficient basis to justify the setting aside of the August 22, 1997 Order compelling the parties to go to arbitration. The plaintiff has the burden under Fed.R.Civ.P.60 to prove there was misconduct on the part of the defendant by clear and convincing evidence, and demonstrate that the misconduct prevented her from fully and fairly presenting her claims or defenses. See Square Construction Co. v. Washington Metro Area Transit Authority, 657 F.2d 68 (4th Cir. 1981); Moeller v. D'Arrigo, 163 F.R.D. 489,493-94 (E.D.Va. 1995).

Plaintiff, in her prior pleadings and motion to this Court, alleged that the arbitration process was inappropriate whereas it would be more lengthy and costly than litigation. To the extent that this motion is restating the same argument as her April 9, 1998 motion, it is improper. A Rule 60(b) motion is not for reconsideration of legal issues already addressed in an earlier ruling. See CNF construction, Inc. v. Donohoe Construction Co., 57 F.3d 395, 401 (4th Cir. 1995).

Plaintiff further argues that the defendant's failure to admit that the plaintiff could not have understood the arbitration

clause to which she agreed and prevented her from fully and fairly presenting her claims. However, the plaintiff was given her opportunity to be heard on this issue in this Court during the defendant's motion to compel arbitration. Plaintiff, in her opposition to that motion, claimed that she had not "agreed" to the arbitration clause when she signed the employment application with the arbitration clause. However, plaintiff did not claim that she did not understand what arbitration meant the time she signed the agreement. These facts that the plaintiff now comes forward with to this Court after there were full briefings and motions on this exact same issue, does not rise to the level of fraud on behalf of the defendant. Plaintiff was given a full and fair hearing on all her claims in front of the Arbitrator, and has not shown any evidence to this Court that she did not receive a fair and impartial arbitration hearing to rise to the level of vacating the arbitral award. Therefore, this Court should find that the plaintiff's motion be denied.

An appropriate Order shall issue.

signed Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
March 29, 1999

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 97-1038-A**
	)	
SETA CORPORATION,	)	
Defendant.	)	
	)	

ORDER

This motion comes before the Court the plaintiff's motion to vacate the arbitral award. For reasons stated in the accompanying Memorandum Opinion, it is hereby,

ORDERED that the plaintiff's motion to vacate the arbitral award is DENIED.

signed Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
April 30, 1999

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 97-1038-A**
	)	
SETA CORPORATION,	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This motion comes before the Court the plaintiff's motion to vacate the arbitral award.

The plaintiff filed suit in this Court on July 2, 1997. In her complaint, she asserted that she was discriminated against in her employment. Based on an arbitration clause that was contained in the defendant's employment application forms, signed by the plaintiff, the Court ruled in favor of SETA to compel arbitration. The plaintiff then filed with this Court a motion for resumption of the judicial proceeding upon termination of the stay of proceedings effective April 22, 1998. This motion was denied by this Court, finding there to be no basis for disturbing the ongoing arbitration.

The arbitration commenced on August 15, 1998 and the parties were given a full hearing on Plaintiff's claims. The Arbitrator issued an award in favor of the defendant on January 7, 1999, however, required the defendant to pay the costs of the arbitration since the defendants had invoked the arbitration clause.

Plaintiff filed a motion to rescind the Order compelling arbitration, vacate the arbitral award, and be granted her constitutional demand for jury trial alleging the defendant committed fraud on this Court when it moved this Court to compel arbitration. This Court denied that motion based on the reasons stated in the Order and Accompanying Memorandum dated April 12,1999. Now the plaintiff comes before this Court on her motion to vacate the Arbitral award based on the allegation that there was evident partiality and misbehavior by the Arbitrator rendering the decision invalid, and that the Arbitrator fundamentally and irreparably abnegated the legally defined burden of proof, so imperfectly executing his powers that no proper award was made.

Plaintiff bases her motion on 9 U.S.C. § 10 of the Federal Arbitration Act ("FAA") which provides, in part, that an award may vacated where the award was procured by fraud, or undue means; where there was evident partiality in the arbitrators; and where the arbitrators exceeded their powers or so imperfectly executed them that a mutual final, and definite award upon the subject matter submitted was not made. The Fourth Circuit, however, grants arbitrators considerable leeway when reviewing arbitration awards. See Apex Plumbing Supply v. U.S. Supply Co., 142 F.3d 188, 193 (4th Cir. 1998); Remmey v. PainWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994).

To demonstrate evident partiality of an arbitrator, the plaintiff has the burden of proving that a reasonable person would have to conclude that the arbitrator was partial to the other party to the arbitration. See Consol. Coal v. Local 1643, United Mine Workers, 48F.3d 125, 129-30 (4th Cir. 1995); Remmey, 32 F.3d at 148-149. The partiality requires a showing of actual bias that is capable of demonstration rather than speculative allegation. The plaintiff must establish that specific facts indicate improper motives on the part of the arbitrator.

The plaintiff has not shown to this Court that there was

evidence of improper motives by the arbitrator, nor has she shown any actual bias. The Arbitrator found in favor of the plaintiff on several of the disputed matters, allowed for a continuance on the hearings over SETA's strong objections, and gave a thorough analysis and opinion as to why the Arbitrator ruled as he did.

The Fourth Circuit's rulings are clear, that even if there is a misinterpretation or misapplication of applicable law, it is insufficient to overturn an arbitration award. See Miller v. Prudential Bache Securities, Inc., 884 f.2d 128, 130-31 (4th Cir. 1989); Remmey, 32 f.3d at 146. Not only is an arbitrator's finding of fact entitled to great deference, even if an award results from faulty legal reasoning or erroneous legal conclusions, an arbitration award remains enforceable. See Upshur Coals Corp. v. UMWA, Dist.31, 933 F.2d 225, 229 (4th Cir. 1991). This Court is hesitant to allow the plaintiff the opportunity to re-litigate her case solely for the reasons that she is unhappy with the Arbitrator's outcome. To do so would render the binding process of the Arbitrator into a purely advisory one. See Remmey, 32 F.3d at 146. Federal policy favors arbitration and encourages arbitration precisely because it is deemed to be speedy, inexpensive and efficient way to resolve disputes without consuming court time. See Rainwater v. National Home Ins., Co., 944 F.2d 190, 192 (4th Cir. 1991). Therefore, the plaintiff's motion should be denied.

An appropriate Order shall issue.

signed Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
April 30, 1999

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 97-1038-A**
	)	
SETA CORPORATION,	)	
Defendant.	)	
	)	

ORDER

This matter comes before the Court the defendant's motion to confirm the arbitration award. For the reasons stated from the bench, it is hereby,

ORDERED that the defendant's motion to confirm the arbitration award is GRANTED and the Arbitrator's award issued on January 6, 1999 is CONFIRMED.

signed Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
May 7, 1999

Supreme Court, U.S.
FILED
MAY 2 2000
OFFICE OF THE CLERK

No. 00-1520

In The Supreme Court of the United States

ANGELA G. McKENZIE,

Petitioner,

v.

SETA CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

Should this Court grant certiorari to answer the following question:

Because Petitioner failed to appeal the final judgment of the District Court, was the Court of Appeals correct in dismissing Petitioner's appeal for lack of jurisdiction?

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I. Because Petitioner McKenzie failed to appeal the final judgment of the District Court, the Court of Appeals properly dismissed her appeal for lack of jurisdiction. 9

II. The confirmation Order which confirmed the arbitration Award was not appealed by McKenzie and is therefore final and not reviewable under final judgment and/or *res judicata* principles. 22

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CORPORATE DISCLOSURE STATEMENT

Respondent SETA Corporation ("SETA") is a Virginia corporation. SETA has no parent corporations, and there are no publicly held companies that own 10% or more of SETA's stock.

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§ 3914.16 (1992) 19

Ibid., §3914.17 21

JURISDICTIONAL STATEMENT

SETA respectfully submits that this Court lacks jurisdiction over this case. SETA's position on this issue is set forth in its first argument below. Stated simply, however, the orders which Petitioner sought to appeal to the Court of Appeals were neither final nor appealable. Petitioner failed to appeal from the *final* order of the District Court which confirmed the arbitration award. That confirmation Order is the final judgment below. McKenzie's failure to appeal that final judgment was - - and remains -- jurisdictionally fatal.

STATEMENT OF THE CASE

Petitioner McKenzie ("McKenzie") correctly states that the United States Court of Appeals for the Fourth Circuit dismissed her appeal below for lack of jurisdiction. The basis for the ruling below was that the orders McKenzie sought to appeal are not designated as appealable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, nor did they represent a "final decision" under the FAA.

As the Court of Appeals observed, the procedural history of this action is important because the timing and nature of certain motions and orders in the District Court affected whether appellate jurisdiction existed. While McKenzie attempted to note appeals of three orders of the District Court, she failed to appeal the *final* order which came after those prior three orders. The Court of Appeals determined that McKenzie's failure to appeal that *final* order mandated dismissal of her appeal for lack of jurisdiction. The

relevant[1] factual background is as follows:

McKenzie filed her Complaint against SETA in the District Court asserting statutory and tort claims arising from the termination of her employment. Based on the arbitration clause contained in the employment application McKenzie signed, SETA moved to compel arbitration. Following briefing and submission of various materials by the parties, as well as oral argument, the District Court issued its Order compelling arbitration (the "arbitrability Order"). Petition Appendix, pp. A8-A9. That arbitrability Order did *not* dismiss the case; to the contrary, it stayed the case pending arbitration, and directed counsel to submit periodic status reports to the District Court.

The parties then agreed that arbitration would be conducted under the aegis of the American Arbitration Association ("AAA") in accordance with the AAA's Rules for the Resolution of Employment Disputes ("AAA Rules").

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[1]SETA takes strong issue with McKenzie's version of the underlying "facts" of this case as set forth in her Petition. Given the jurisdictional dismissal of the appeal below, the Court of Appeals never addressed those factual issues, including the facts as found by the Arbitrator (which were in SETA's favor on all material issues). Accordingly, though we are mindful of Rule 15.2, the truth is McKenzie's mis-statement of "facts" does not have a bearing on the jurisdictional issue presented. That being said, SETA feels compelled to point out one glaring omission in the Petition: McKenzie's allegations of fraud against SETA and its counsel were the subject of a *second* lawsuit she filed in the District Court, which was *dismissed by* the District Court, and which dismissal was *affirmed* by the Court of Appeals. *McKenzie v. SETA, et al.*, No. 99-1778 (unpublished, 4th Cir., February 24, 2000), *rehearing and rehearing en banc denied*, May 31, 2000. McKenzie did not appeal that decision of the Court of Appeals. Thus, McKenzie's fraud allegations are completely baseless - - both factually and legally.

A Consent Order to that effect was submitted by the parties and entered by the District Court. *See* SETA Appendix, A:7 - A:8. AAA Rule 35(c) provides in its entirety:

> Parties to these procedures shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction.

Arbitration proceedings ensued. Per the AAA Rules, the parties selected an Arbitrator, Ira F. Jaffe, Esq. Mr. Jaffe is an attorney licensed in Virginia, Massachusetts and the District of Columbia, and has served as a full-time arbitrator/mediator specializing in the labor and employment area for more than 17 years, handling more than 2,000 cases.

During the pendency of the arbitration proceedings, McKenzie filed a motion in the District Court seeking to terminate the arbitration and to resume proceedings in the District Court. The District Court found no basis for disturbing the ongoing arbitration and stayed the case until the completion of arbitration. *See* SETA Appendix, A:9. As with its original arbitrability Order, the District Court again did *not* dismiss the action.

Following the conclusion of the arbitration proceedings, the Arbitrator issued his highly-detailed written opinion and Award (some 66-pages), which ruled in SETA's favor on all claims. Nevertheless, the Arbitrator assessed *all* Arbitrator fees (totaling $27,000) and *all* AAA costs (totaling more than $4,300) against SETA. SETA did not challenge that cost assessment, and instead promptly paid those sums.

McKenzie alleges that the Arbitrator was biased and demonstrated "manifest disregard" of applicable law,

including his allegedly mis-applying the relevant burden of proof analysis under Title VII. *See,* Petition, pp. 11, 13-14. The Award, however, begins with a 41-page recitation of the procedural background and facts (including the Arbitrator's various findings), and follows with a 14-page analysis and application of Title VII principles. Contrary to McKenzie's assertions, the Arbitrator specifically noted the governing standard; namely, that "There is employment discrimination whenever an employee's pregnancy is a motivating factor for the employer's adverse employment decision" (citing 42 U.S.C. § 2000e-2(m). Award, p. 42. After considering the evidence, including: (i) McKenzie's absenteeism (which the Arbitrator found to be "excessive by any reasonable measure," Award, p. 51); (ii) McKenzie's failure to establish that all of her 1996 absences were due to pregnancy-related illness; (iii) the "Monday/Friday" pattern of McKenzie's absences; (iv) McKenzie's absenteeism both at SETA and at her subsequent employer while not pregnant (which the Arbitrator described as "a clear picture of an employee who has frequent absences from work even during periods that she is not pregnant," Award, p. 16); (v) the fact that regular attendance was "clearly an essential requirement of the position" held by McKenzie at SETA, Award, p, 52; and (vi) the fact that there was no showing that SETA tolerated a similar pattern of absenteeism by any non-pregnant employees, Award, p. 51, the Arbitrator concluded, "For all these reasons, the claim of violation of Title VII/PDA due to discrimination on the basis of sex/pregnancy is rejected in its entirety." Award, p. 54.

Unhappy with the Award against her, McKenzie then filed in the District Court her "first" motion to vacate the Award (based on what she alleged was fraud by SETA and its counsel). In both her motion and its supporting memorandum, McKenzie made clear that this was the first of what would be two successive motions to vacate the Award, each based on separate alleged facts and theories. Included in McKenzie's filing was a formal "Notice to the Court" stating that, should the District Court grant her "first" motion to vacate, then her planned "second" motion to vacate would be unnecessary as being moot.

The District Court rejected McKenzie's fraud allegations and found that McKenzie was given a "full and fair hearing on all her claims in front of the Arbitrator." Accordingly, the District Court denied McKenzie's "first" motion to vacate by Order (and accompanying Memorandum Opinion) dated March 29, 1999 (the "first motion Order"). Petition Appendix, pp. A10-A13.

On April 6, 1999, McKenzie filed her "second" motion to vacate the Award (based on what she alleged was Arbitrator misconduct, including the Arbitrator's alleged bias and alleged "manifest disregard" of applicable law).[2] Meanwhile, on April 21, 1999 - - a mere 15-days later and prior to any hearing on McKenzie's "second" motion - -

---

[2] In her Petition, McKenzie states she filed her "second" motion "[w]hile her First Motion was pending." Petition, p. 13. That statement is flatly false. As McKenzie admits, the District Court denied her "first" motion by Order filed March 29, 1999, Petition, p. 14, and yet McKenzie also admits her "second" motion was not filed until April 6, 1999. Petition, p. 13.

SETA filed its motion to confirm the Award. Hence, on April 21, 1999 and thereafter, two motions were simultaneously pending before the District Court: namely, McKenzie's "second" motion to vacate the Award and SETA's motion to confirm the Award.

McKenzie proceeded to file various - - and separate - - papers in connection with those two pending motions. On April 22, 1999, McKenzie filed a reply memorandum in support of her "second" motion to vacate. On April 30, 1999, McKenzie filed an opposition to SETA's motion to confirm contending, *inter alia,* that SETA's motion was *premature* because the District Court had not then ruled on McKenzie's pending "second" motion to vacate. In fact, McKenzie went so far as to state that for SETA to seek confirmation of the arbitration Award at that time "with full knowledge of plaintiff's pending ["second"] motion does not, in our view connote good faith."

The District Court denied McKenzie's "second" motion to vacate by Order (and accompanying Memorandum Opinion) dated April 30, 1999 (the "second motion Order"). Petition Appendix, pp. A14-A17. In so doing, the District Court squarely rejected McKenzie's allegations of Arbitrator bias and/or misconduct. The District Court added, "This Court is hesitant to allow the plaintiff the opportunity to re-litigate her case solely for the reasons that she is unhappy with the Arbitrator's outcome. To do so would render the binding process of the Arbitrator into a purely advisory one." *Id.* at A17

Subsequently, a hearing was held in the District Court on May 7, 1999 upon SETA's motion to confirm the Award.

Following the hearing, the District Court announced its decision and rationale from the bench[3], which later that same day were referred to and embodied in the District Court's Order dated May 7, 1999 confirming the Award (the "confirmation Order").[4] Petition Appendix, p. A18. This confirmation Order was the last Order entered by the District Court. Although McKenzie sought to appeal three prior Orders of the District Court (the arbitrability Order, the first motion Order and the second motion Order), she admits at page 16 of her Petition that **she never noticed an appeal of the final confirmation Order.**[5]

In the Court of Appeals, SETA filed a motion to dismiss McKenzie's appeal with respect to the first and second motion Orders on jurisdictional grounds, contending that such Orders were not appealable final orders, and that the only *final* order was the confirmation Order. The Court of Appeals granted SETA's motion by Order filed February 23, 2000. Petition Appendix, p. A7. By Order filed March 16, 2000, the Court of Appeals denied McKenzie's motion for *en*

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[3]McKenzie does not append to her Petition the transcript which contains the District Court's basis for its decision.

[4]McKenzie states that this confirmation Order was entered "[w]hile the appellate proceedings were in progress." Petition, p. 15. McKenzie states she filed her first Notice of Appeal on April 28, 1999. *Id.* The confirmation Order was, as McKenzie admits, filed on May 7, 1999. *Id.* We know of no "appellate proceedings" in the Court of Appeals between April 28 and May 7, 1999. McKenzie admits she did not even file her brief in the Court of Appeals until June 21, 1999. Petition, p. 16.

[5]We are at a complete loss as to what McKenzie means when she refers to this confirmation Order as a "*post-appeal* order of the district court." Emphasis added. *See* Petition, p. 16.

banc reconsideration thereof. *See* SETA Appendix, A:6.

McKenzie's appeals of the first and second motion Orders having been dismissed, and McKenzie not having appealed the confirmation Order, the *only* order which remained for consideration by the Court of Appeals was the original arbitrability Order. After briefing and oral argument, the Court of Appeals dismissed McKenzie's appeal from that Order as well on the same jurisdictional grounds.[6] Petition Appendix, p. A1-A5.[7]

McKenzie's Petition for Certiorari then followed.

SUMMARY OF ARGUMENT

These is nothing in this case which warrants review on certiorari. McKenzie is flat-out incorrect in alleging that

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[6]We disagree that SETA "conceded ... appellate jurisdiction" with respect to the arbitrability Order. *See* Petition, pp. 16, 18. By the motion to dismiss filed in the Court of Appeals, SETA merely first moved to dismiss the appeals as to the first and second motion Orders. McKenzie's "concession" allegation is thus factually false, and legally irrelevant in any event as a party simply cannot confer appellate jurisdiction by consent or waiver. *See, e.g., Ins. Corp. v. Compagnie Des Bauxites,* 456 U.S. 694, 702 (1982) ("... no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, *California v. LaRue,* 409 U.S. 109 (1972), principles of estoppel do not apply, *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion.")

[7]McKenzie's Petition Appendix omitted page 2 of the decision (and included page 3 twice). For the convenience of the Court, a full copy of the decision is included in SETA's Appendix at A:1-A:5.

the certiorari considerations contained in Rule 10 are satisfied in this case. The question of "finality" of arbitration orders has already been authoritatively decided by this Court in *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. __ 99-1235 (December 11, 2000). Furthermore, McKenzie simply failed to follow proper procedure in order to appeal. The Orders which McKenzie sought to appeal are just not appealable orders under the FAA. Consequently, the Court of Appeals was correct in determining that it lacked appellate jurisdiction. Alternatively, the Orders which McKenzie sought to appeal were confirmed by the subsequent confirmation Order which was not appealed. Thus, review of the prior Orders would be foreclosed by final judgment and/or *res judicata* principles in any event.

ARGUMENT

I. Because Petitioner McKenzie failed to appeal the final judgment of the District Court, the Court of Appeals properly dismissed her appeal for lack of jurisdiction.

McKenzie erroneously asserts that this case is important because it implicates the Federal judiciary's alleged "supervision and control" of the arbitration process. Petition, p. 19. Not only does that allegation misconstrue the role of the Federal judiciary, but it is also incorrect. This case deals with appellate jurisdiction; the underlying arbitral process is simply not the issue at hand.

Section 16 of the FAA[8] sets forth the types of orders regarding arbitration which are - - and those which are not - - appealable. The Orders McKenzie sought to appeal are simply not among the appealable types.

We begin by examining whether any of the three Orders McKenzie sought to appeal are among those enumerated within the express terms of Section 16 as being appealable. None are.

The arbitrabilty Order compelled arbitration and stayed the litigation. It did not dismiss all or any portion of the case. To the contrary, by its terms, it directed counsel to provide periodic status reports. §16(b)(1) expressly *precludes* an appeal from that Order. Further, *Green Tree, supra* at fn. 2, authoritatively states:

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[8] § 16. Appeals. (a) An appeal may be taken from -
(1) an order-
(A) refusing a stay of any action under section 3 of this title,
(B) denying a petition under section 4 of this title to order arbitration to proceed,
(C) denying an application under section 206 of this title to compel arbitration,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award;
(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
(3) a final decision with respect to an arbitration that is subject to this title.
(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order -
(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title.

> Had the District Court entered a stay instead of a dismissal in this case, that order would not have been appealable. 9 U.S.C. § 16(b)(1).

Clearly, the arbitrability Order was not appealable.

Likewise, the first and second motion Orders are not within any of the types of Orders for which Section 16 expressly permits an appeal. Those Orders *denied* motions to vacate. As to a motion to vacate, §16(a)(1)(E) only permits an appeal from an order which *vacates* an award. Clearly again, therefore, neither the first nor second motion Orders are appealable under the express terms of Section 16.

McKenzie apparently concedes that the foregoing Orders fail to satisfy the express terms of Section 16, and thus she must necessarily argue that *each* such Order is "a final decision with respect to an arbitration" under §16(a)(3). Again, clearly none are. But before addressing the specifics of that untenable argument, we will first address the conceptual framework from which that argument emanates.

McKenzie argues that Section 16 creates a "parallel scheme" of appellate procedures; the distinction allegedly being that there is one scheme for parties aggrieved by an arbitration award, and another scheme for parties favored by an arbitration award.[9] Petition, pp. 20-25. McKenzie cites neither legislative history nor any decisional authority for that

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[9]McKenzie also makes much of the different time frames the FAA provides for filing motions to vacate versus motions to confirm in the District Courts. *See* Petition, p. 20. Those time frames are matters of legislative judgment having absolutely nothing to do with the appellate jurisdiction issue presented here.

proposition. To the contrary, as *Green Tree* instructs, Section 16 preserves appeal of any "final decision with respect to an arbitration" *regardless* of whether the decision is favorable or hostile to arbitration. 121 S.Ct. at 519.

Moreover, the text of Section 16 belies McKenzie's assertion. Under § 16(a)(1)(D), for example, an order which *either* confirms *or* denies confirmation of an award *is* appealable. Who prevailed is irrelevant to appealability.[10] What Section 16 does is create a *unified* appellate scheme, with very clear rules. Conceptually speaking, those rules are that orders favoring arbitration are not appealable until the very end of the case, while orders precluding or staying arbitration are immediately appealable. Section 16 addresses *types* of orders, not *who prevails.* In short, Section 16 reflects the FAA's "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983).

Further, McKenzie's position is that there can be multiple "final judgements" (emphasis added) in the District Court, thereby allowing multiple appeals (presumably, a separate appeal from each such alleged separate final judgment in a case). Petition, p. 23. McKenzie's premise would allow separate (and presumably limitless) appeals from

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[10]The FAA is likewise outcome-neutral as to who can move to confirm an award (*see* Section 9 which states that "*any* party to the arbitration" may move for confirmation). While admittedly the prevailing party is the party most likely to do so, the point is McKenzie is simply wrong in stating that the text of the FAA creates "parallel, distinct and separate" procedures, Petition, p. 20, based on who prevailed in arbitration.

separate (and presumably limitless) District Court orders.[11] Again, McKenzie cites no authority for this novel - - and we submit unsupportable - - proposition. In this case, McKenzie filed and lost two separate motions to vacate, each bottomed on separate matters. She apparently is of the view that each is "final" and each is appealable. Were that the law, a party who is unhappy with an arbitration award could file as many motions to vacate (or to modify, or to correct, etc.) as his/her imagination could concoct, proceed separately as to each on motions practice in the District Court, and appeal all adverse decisions *seriatim*. Such is simply not the law. As Justice Frankfurter wrote for a unanimous Court in *Cobbledick v. United States*, 309 U.S. 323, 325 (1940):

> Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

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[11]Were that the case, then necessarily the "final judgment" of the Court of Appeals as to the first and second motion Orders would be the decision which dismissed the appeals from those Orders. Yet McKenzie states that the "final judgment" - - singular - - of the Court of Appeals was that Court's last Order which only dismissed the arbitrability Order. McKenzie's position is thus not only internally inconsistent, but would also have the effect of making her Petition untimely as to the first and second motion Orders under 28 U.S.C. § 2101(c) and Rule 13.

> To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Apart from misapprehending the text and purpose of the FAA's appellate scheme, McKenzie blithely ignores this Court's precedent. While McKenzie cites the *Green Tree* decision, she nowhere addresses this Court's discussion in Part II of *Green Tree* concerning the finality of orders regarding arbitration. This Court authoritatively determined that the term "a final decision with respect to an arbitration" under Section 16(a)(3) of the FAA is to be accorded its "well-established meaning." In this Court's words (quoting *Catlin v. United States,* 324 U.S. 229, 223 (1945)):

> ...the term 'final decision' has a well-developed and longstanding meaning. It is a decision that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'

This is the precise basis, and indeed the precise quote the Court of Appeals cited and applied in dismissing McKenzie's appeal. *See*, SETA Appendix, p. A-4.[12]

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[12]*See also* Fed. R. App. Proc. 28 (a)(4)(D) (the appellant's brief must contain "an assertion that the appeal is from a final order or judgment that disposes of all parties' claims"). Clearly, SETA's claim for judicial confirmation of the arbitration Award was not disposed of - - and was in fact resisted by McKenzie - - until the confirmation Order was entered. McKenzie's designation of the three prior Orders as the Orders being appealed from limited the jurisdiction of the Court of Appeals to those Orders. *See* Fed. R. App. Proc.3(c) (a notice of appeal "must: ... designate the judgment, order or part thereof being appealed").

By definition then, there can only be ***one*** such "final decision" in a case.[13] The question is, in this case, which Order is the "final decision"? The answer is plain - the confirmation Order, which was the last Order in time, as well as the last Order in substance. It - - and no other Order - - "ended the litigation on the merits."

The arbitrability Order clearly did not terminate the litigation in the District Court. It dismissed nothing, and merely stayed the case pending the outcome of arbitration.

Likewise, the first motion Order did not terminate the litigation. McKenzie herself formally notified the District Court that she was preparing a second motion to vacate which would be predicated on separate grounds.

Similarly, the second motion to vacate did not terminate the litigation. It was but 1 of 2 then-competing motions, the other being SETA's motion to confirm the arbitration Award. Even there, McKenzie resisted SETA's confirmation motion as being "premature" given her then-pending second motion to vacate. McKenzie's position was that her second motion to vacate should be decided first, and *then* the District Court should address - - separately - - SETA's motion to confirm. In fact, that is precisely what the District Court did. McKenzie therefore cannot seriously argue that the District Court's decision on her second motion to vacate was somehow the "final" order.

In contrast to the Orders which McKenzie argues are

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[13]Of course, the District Court may expressly direct entry of a final judgment as to one or more but fewer than all claims in a case. *See* Fed. R. Civ. Proc. 54(b). McKenzie does not allege that occurred in this case.

"final," the District Court's confirmation Order which confirmed the arbitral Award did of its own force terminate the litigation. Because of it, and only because of it, nothing further remained for the District Court to do. That confirmation Order constitutes the final judgment in this case. McKenzie, however, failed to appeal that *final* Order. Consequently, appellate jurisdiction over the earlier Orders is utterly lacking.

By attempting to notice appeals with regard to the prior Orders, McKenzie sought to obtain exactly what the final judgment rule is intended to preclude - - piecemeal disposition of decisions on appeal. *See Catlin,* 324 U.S. at 233-34. Piecemeal appeals are precluded, *inter alia*, because a final decision in a case by the District Court may preclude the need for any appeal at all. *See Cheng v.C.I.R.*, 878 F.2d 306, 310, n.5 (9th Cir. 1989) ("final disposition in the trial court, by way of settlement or ultimately acceptable judgment, may preclude any appeal at all"). In addition, permitting separate reviews of the component elements of a final decision unnecessarily burdens judicial administration by the Courts of Appeal. *See Stringfellow v. Concerned Neighbors in Action,* 480 U.S. 370, 380 (1987) (noting that the finality rule protects a variety of interests that contribute to the efficiency of the legal system, including minimizing disruption, delay and litigation expenses, and review of issues that may become moot or irrelevant would burden appellate courts).

Unbelievably, McKenzie argues that the decision of the Court of Appeals is in "direct conflict" with this Court's decision in *First Options of Chicago, Inc. v. Kaplan,* 514 U.S.

938 (1995) [mis-cited by McKenzie as being in *513* U.S.]. Several responses are in order.

First, even if McKenzie's "direct conflict" allegation was true (which is not the case), this Court's decision in *Green Tree, supra,* would have superceded any prior decision.

Second, the alleged full quotation from *First Options* cited by McKenzie at page 26 of her Petition does not appear in the decision itself, but rather appears to be from a headnote (and perhaps that explains why McKenzie fails to cite a specific page reference).

Third and in any event, the appellate standard of review issue is obviously different from the issue of appealability *vel non.* The issues in the *First Options* simply have nothing to do with the appellate jurisdiction issue presented here. The issues in *First Options* were, in this Court's own words: "The first question is the standard of review applied to an arbitrator's decision about arbitrability" 514 U.S. at 942, and second, "We turn next to the standard a court of appeals should apply when reviewing a district court decision that refuses to vacate or confirms an arbitration award." (Internal citations omitted.) *Id.* at 947. The first issue was a "who decides" one. The second issue was whether "ordinary" review standards should be applied (*i.e.,* findings of fact being reviewed under the "clearly erroneous" standard but deciding questions of law *de novo*) or rather "a specially lenient 'abuse of discretion' standard (even as to questions of law)... ." 514 U.S. at 948. Neither issue is at play in this case.

McKenzie is equally incorrect in suggesting that Courts of Appeal routinely exercise jurisdiction over District Court orders denying motions to vacate - - thereby implying that such jurisdiction is exercised regardless of the *finality* of any such order. Petition, p. 28. In *none* of the decisions cited by McKenzie was the order denying the motion to vacate followed by a confirmation order - - which is the instant case. In fact, McKenzie's cited cases do not even address appellate jurisdiction (other than the Third Circuit decision in *Kaplan v. First Options,* 19 F.3d 1503, 1509 (3rd Cir. 1994) which finds jurisdiction based on an Order *confirming* an award). In short, none of McKenzie's cited cases render orders denying motions to vacate *per se* final, and therefore *per se* appealable.

McKenzie simply fails to comprehend the straight-forward two-step analysis governing appealability of orders under the FAA; namely, first, is the order presented one that is expressly enumerated as being appealable under Section 16 (and even McKenzie does not argue that the answer to that question in this case is "yes"); and if not, then second, is the order presented "a final decision with respect to an arbitration" (as defined in *Green Tree, supra)*? In this case, the only Order which "end[ed] the litigation on the merits" was the final confirmation Order - - period. In contrast, when there is an order which is *expressly* appealable under the FAA, such as an order confirming an award, it is appealable even if it is *not* the final judgment. *See Hewlett-Packard Co., Inc. v. Berg,* 61 F.3d 101 (1st Cir. 1995). Orders which are *not* expressly appealable must therefore satisfy finality requirements. *See* Wright, Miller & Cooper, *Federal*

Practice and Procedure Jurisdiction 2d, § 3914.16, p. 36 (1992) (§ 16 does not list all orders that Courts may make with respect to arbitration and the "[f]inal judgment doctrine remains to fill the gaps.")

Three further arguments of McKenzie deserve brief mention, even though they are somewhat afield from the jurisdictional issue presented.

First, McKenzie argues there was "no ... agreement" between the parties so as to allow confirmation of the Award under Section 9 of the FAA. Petition, p. 22. As noted in our Statement of the Case, *supra* at 2-3, the parties *agreed* in a Consent Order that the arbitration would be conducted under the AAA's Rules. *See* SETA Appendix, A:7-A:8. AAA Rule 35(c) expressly provides:

> Parties to these procedures shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction.

McKenzie's assertions that there was "no such agreement" is simply false. SETA had every right to seek confirmation.

Second, McKenzie also attempts a policy-type argument contending that a party who prevails in arbitration could wait as long as 1-year to seek confirmation, and thus have some form of "veto power" over the other party's appeal rights. Petition, p. 25. Whatever may be the possible time frames in other cases, the fact is that in *this* case, the parties were pursuing competing motions at the *same* time (*i.e.*, McKenzie's "second" motion to vacate and SETA's motion to confirm). McKenzie's speculation as to possibilities in other cases has no bearing on *this* case. Further, SETA did

not delay, or otherwise act in any fashion which sought to "veto" McKenzie's right to appeal. As noted previously, McKenzie's "first" motion to vacate gave advance notice that a "second" motion" to vacate was on the horizon. Promptly following McKenzie's filing of her "second" motion, SETA filed its motion to confirm (in fact, within the ensuing 15 days). Even then, McKenzie accused SETA of being *premature.* One wonders how, then, McKenzie believes SETA should have proceeded in its efforts to obtain confirmation. The fact is SETA moved as expeditiously as possible, especially in light of McKenzie's *seriatim* approach.

Thus, McKenzie herself was the party who elected to proceed in a *seriatim* fashion. She started with her "first" motion to vacate; after losing that, she proceeded with her "second" motion to vacate; and in response to SETA's motion to confirm, she argued that SETA was "premature" as the District Court, according to her, should first rule on her "second" motion to vacate before addressing SETA's motion to confirm (which is exactly what the District Court did). The *finality* of the confirmation Order in this case is due in large measure to McKenzie's own actions.

McKenzie also contends that the denial of her "first" motion to vacate was, to the extent it was based on Rule 60(b)(3) of the Federal Rules of Civil Procedure, within the "plenary jurisdiction" of the Court of Appeals (apparently being of the view that somehow a Rule 60(b) motion in an arbitration case precludes the application of Section 16 of the FAA and instead triggers the "plenary" jurisdiction of 28 U.S.C. § 1291). Petition, pp. 28-30. Once again, however, McKenzie neither explains why this is allegedly so, nor

provides decisional authority for her proposition. In fact, however, 28 U.S.C. § 1291 provides only that the Courts of Appeal have jurisdiction of appeals from all "*final* decisions" of the District Courts. As *Green Tree, supra,* instructs, the term "final decision" is not unique to arbitration and has a long-standing and well-understood meaning. *See also,* Wright, Miller & Cooper, *Federal Practice and Procedure Jurisdiction 2d*, § 3914.17, p. 8 (1992) ("there is no reason to attempt to live with separate rules of finality for the different statutes.") Moreover, there is nothing in 28 U.S.C. § 1291 which provides for any special treatment in reviewing a Rule 60(b) motion. In short, McKenzie's arguments again remain wanting.

Stated simply, by ignoring the final judgment rule and by failing to notice an appeal with respect to the final judgment entered by the District Court, McKenzie failed to perfect any appeal whatsoever. Had McKenzie instead appealed the *final* judgment of the District Court, she would have sufficiently preserved her right to appeal with regard to all prior orders intertwined with the final judgment. She simply failed to do so. Consequently, the Court of Appeals was plainly correct in dismissing McKenzie's appeal for lack of jurisdiction.

II. The confirmation Order which confirmed the arbitration Award was not appealed by McKenzie and is therefore final and not reviewable under final judgment and/or *res judicata* principles.

Even assuming *arguendo* that the Orders McKenzie sought to appeal were reviewable under the FAA, the issues involved therein became moot once she failed to appeal the confirmation Order which confirmed the arbitral Award. By the confirmation Order, the District Court approved the results of the arbitration and, under §§ 9 and 13 of the FAA, effectively entered judgment on the Award. That judgment has not been appealed. Consequently, review of that judgment is precluded under final judgment and/or *res judicata* principles. *See Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394 (1981).

CONCLUSION

As we have shown, there is nothing in this case which warrants review on certiorari. There is nothing in the decision of the Court of Appeals in disharmony with either this Court's decisions or with decisions from other Circuit Courts. The law of finality of orders is well-established, and the recent *Green Tree* decision makes that established body of law applicable to appeals under the FAA. We submit that none of the considerations governing review on certiorari under Rule 10 are met, nor is any substantial question of import presented. This is a clear, simple case where a party

simply failed to do what was required to perfect an appeal. Accordingly, and for the foregoing reasons, Respondent SETA Corporation respectfully requests that McKenzie's Petition for A Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ANGELA G. MCKENZIE,
Plaintiff-Appellant,

v.

SETA CORPORATION,
Defendant-Appellee.

No. 99-1576

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-97-1038)

Argued: November 3, 2000

Decided: December 8, 2000

Before WIDENER, MICHAEL, and MOTZ, Circuit Judges.

Dismissed by unpublished per curiam opinion.

COUNSEL

ARGUED: Wendu Mekbib, LAW OFFICES OF WENDU MEKBIB, Vienna, Virginia, for Appellant. Richard Mark Dare, REED, SMITH, HAZEL & THOMAS, L.L.P., Falls Church, Virginia, for Appellee. **ON BRIEF:** Michael C. Montavon, MICHAEL C. MONTAVON, P.C., Fairfax, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

After Angela McKenzie was discharged from her job by SETA Corporation (SETA), she sued her former employer asserting Title VII sex discrimination and several state law claims. The district court granted SETA's motion to compel arbitration as provided for in McKenzie's employment application. After the arbitrator dismissed all of McKenzie's claims, McKenzie twice moved the district court to vacate the arbitral award. The district court denied McKenzie's motions to vacate and granted SETA's motion to confirm the award. McKenzie appealed the district court's orders compelling arbitration and denying her motions to vacate. We previously dismissed for lack of jurisdiction that portion of McKenzie's appeal challenging the orders denying her motions to vacate. The remaining portion of McKenzie's appeal, which challenges the district court's order compelling arbitration, must also be dismissed for lack of jurisdiction.

I.

On February 20, 1995, McKenzie began working for SETA in McLean, Virginia. SETA provides information technology systems and services to federal government agencies and other clients. SETA hired McKenzie as an executive secretary and later promoted her to the proposal production staff. In February 1995 McKenzie became pregnant, but she suffered a miscarriage soon thereafter. SETA allowed her to be absent from work for several days for recuperation. In December 1995 McKenzie became pregnant again. Because this pregnancy was plagued with complications, she missed many days of work. McKenzie explained the reasons for her absences to her supervisors. After several months, on April 12, 1996, when McKenzie was absent from work due to illness, SETA discharged her, stating that a "reduction in the proposal staff" was the reason.

On October 2, 1996, McKenzie filed a formal charge with the Fairfax County Human Rights Commission, alleging sex and pregnancy discrimination in SETA's decision to terminate her. The Human Rights Commission issued her a notice of right to sue. McKenzie subsequently filed this action in federal court, alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, wrongful discharge, intentional infliction of emotional distress, and breach of contract. SETA moved to compel arbitration on the ground that McKenzie had signed an employment application that included an arbitration clause. The application provided:

> I understand and agree to the following:
>
> . . . .
>
> . . . I understand that all controversies, claims, and/or disputes arising out of the termination of my employment with SETA Corporation shall be settled exclusively through binding arbitration.

The district court granted SETA's motion and stayed the case pending the completion of arbitration. The parties proceeded with arbitration, and on January 6, 1999, the arbitrator dismissed all of McKenzie's claims against SETA. In particular, the arbitrator concluded that McKenzie had not proven that SETA terminated her because of her pregnancy. SETA was required to pay the arbitrator's compensation and the other expenses of arbitration.

At this point, the procedural history of this action becomes important because the timing and nature of certain motions and orders in district court affect whether we have jurisdiction to hear this appeal. On March 8, 1999, McKenzie filed a motion to vacate the arbitral award, arguing that SETA fraudulently induced her to sign the employment application by concealing its (SETA's) knowledge that nonlawyers do not understand arbitration clauses. The district court denied the motion on March 29, 1999, reasoning that SETA's conduct did not rise to the level of fraud. On April 6, 1999, McKenzie filed a second motion to vacate the arbitral award, claiming that the arbitrator displayed partiality and a manifest disregard for the law by requiring direct evidence of SETA's discriminatory intent. On April 21,

1999, before the district court ruled on the second motion to vacate, SETA moved to confirm the arbitral award. On April 28, 1999, McKenzie noted an appeal from the district court's March 29, 1999, order denying her first motion to vacate and from the court's August 22, 1997, order compelling arbitration. On April 30, 1999, the district court denied McKenzie's second motion to vacate, concluding that she had failed to show actual bias on the part of the arbitrator and that the arbitrator's misapplication of the law is not a ground for vacating his award. On May 5, 1999, before the district court ruled on SETA's motion to confirm, McKenzie filed an amended notice of appeal, noting an appeal from the order denying her second motion to vacate. Two days later, on May 7, the district court entered an order confirming the arbitral award. McKenzie did not take an appeal from the confirmation order.

After McKenzie filed her briefs in our court, SETA moved to dismiss, for lack of jurisdiction, McKenzie's appeal insofar as it challenged the orders denying the motions to vacate. SETA argued that these orders are not appealable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. The FAA provides that an appeal may be taken from, among other things, an order "confirming or denying confirmation of an award or partial award," an order "modifying, correcting, or vacating an award," and "a final decision." 9 U.S.C. § 16(a). A final decision is one that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). SETA argued that the orders *denying* the motions to vacate do not fall into any of the enumerated categories, nor are they final decisions because the litigation here continued and the district court still had something to do, that is, confirm the arbitral award. Therefore, according to SETA, the district court's "final decision" was rendered on May 7, 1999, when it confirmed the arbitral award. The confirmation order was an appealable order, but McKenzie failed to take an appeal from that order. We accepted SETA's argument and dismissed McKenzie's appeal with respect to the two orders denying the motions to vacate. *See McKenzie v. SETA Corp.*, No. 99-1576 (CA-97-1038) (4th Cir. Feb. 23, 2000). Accordingly, all that remains in the present appeal is McKenzie's challenge to the district court's order compelling arbitration.

II.

McKenzie asserts that she is entitled to a trial by jury and that the district court should not have ordered the parties to resolve their dispute through arbitration. She first argues that the arbitration clause only said that she "understands" that all disputes are to be settled by arbitration, but the clause did not say that she "agrees" to such arbitration. Second, McKenzie claims that SETA fraudulently induced her to sign the employment application by hiding from her the company's knowledge that nonlawyers do not understand the meaning of arbitration. SETA responds on the merits, but it also argues that McKenzie's appeal should be dismissed because she failed to appeal from the confirmation order, the only appealable order in this case.

In an earlier order we dismissed McKenzie's appeal from the orders denying her motions to vacate the arbitration award. Those orders are not designated as appealable under the FAA, nor do they represent a "final decision" under the Act. *See* 9 U.S.C. § 16(a). We also have no choice except to dismiss the remaining portion of McKenzie's appeal. The one remaining order that McKenzie seeks to challenge, the interlocutory order granting the motion to compel arbitration, is not by itself an appealable order. *See id.* § 16(b)(3). In order to challenge it, McKenzie must have noted an appeal from a final decision or from an order designated as appealable under the FAA. *See F.C. Schaffer & Assocs. v. Demech Contractors, Ltd.*, 101 F.3d 40, 42-43 (5th Cir. 1996) ("[T]his court lacks jurisdiction to review the district court's decision regarding the arbitrability of the parties' dispute until there is an appealable, *i.e.* final, order."). Because there is no appealable order before us, we are without jurisdiction.

We would have jurisdiction if McKenzie had appealed from the confirmation order. At the time she filed her amended notice of appeal on May 5, 1999, she knew that SETA's motion to confirm the arbitral award was pending. Nevertheless, she chose to proceed with her appeal at that time. Two days after McKenzie filed her amended appeal, the district court issued its final decision, an order confirming the award. Because McKenzie did not note an appeal from that order, we must dismiss the remainder of this appeal for lack of jurisdiction.

DISMISSED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED March 16, 2000

No. 99-1576

CA-97-1038

ANGELA G. MCKENZIE

Plaintiff - Appellant

v.

SETA CORPORATION

Defendant - Appellee

ORDER

Appellant filed a motion for en banc reconsideration of the partial dismissal of the appeal for lack of jurisdiction.

As no member of this Court or the panel requested a poll on the suggestion for en banc reconsideration.

IT IS ORDERED that the motion for en banc reconsideration is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE,	)	
Plaintiff,	)	
v.	)	C.A. No. 97-1038-A
SETA CORPORATION,	)	
Defendant.	)	

CONSENT ORDER

IT APPEARING to the Court that the parties have agreed to submit this dispute to arbitration under the aegis of the American Arbitration Association ("AAA") in accordance with the AAA's Rules for the Resolution of Employment Disputes,

AND IT FURTHER APPEARING to the Court that Plaintiff has requested additional time to pay the necessary filing fee of the AAA and that defendant has no objection to such an extension of time, and it appearing proper to the Court to do so, is accordingly

ORDERED THAT THIS COURT'S ORDER DATED AUGUST 22, 1997 IS HEREBY MODIFIED AS FOLLOWS:

1. Plaintiff shall file her claims or demands with the AAA, including any required filing fees of the AAA, on or before October 22, 1997.

2. This case remains **STAYED** for one-hundred eighty (180) days from October 22, 1997, during which time the case shall be arbitrated.

3. The parties shall submit to the Court a joint status report upon the plaintiff's filing with the AAA and every sixty (60) days thereafter until the stay expires.

The Clerk is **DIRECTED** to send a copy of this Consent Order to counsel for the parties.

It is so **ORDERED.**

Date September 15, 1997.

/s/ Leonie M. Brinkema
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE,	)	
Plaintiff,	)	
v.	)	Civil Action No. 97-1038
SETA CORPORATION	)	
Defendant.	)	

ORDER

This matter comes before the Court on Plaintiff's motion for resumption of judicial proceedings. It appearing to the Court that there is no basis for disturbing the ongoing arbitration, it is hereby

ORDERED that Plaintiff's motion is DENIED, this matter is STAYED until the completion of arbitration and the parties are directed to return to arbitration.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
April 30, 1998

(3)

Supreme Court, U.S.
FILED
MAY 11 2001
OFFICE OF THE CLERK

No. 00-1520

In The

Supreme Court of the United States

Angela G. McKenzie,

Petitioner,

versus

SETA Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY TO BRIEF IN OPPOSITION

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REPLY TO SETA'S "RESTATEMENT OF QUESTIONS PRESENTED"

The "restatement" is simply question begging and does not have much to do with the exceptionally significant Questions the Petitioner has presented.

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REPLY TO SETA'S "JURISDICTIONAL STATEMENT"

SETA denies this Court's jurisdiction to review the Petition at bar. This is puzzling. The Petition is before this Court pursuant to 28 U.S.C. § 1254(1) *cum* 2101(c). Section 1254 directs:

> "(c)ases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to *any civil ... case,* before or after rendition of judgment or decree."

On the other hand, when and how this is to be done is clearly defined in § 2101(c) which provides in relevant part:

> "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for *within ninety days* after the entry of such judgment or decree."

SETA does not appear to deny that there is a judgment of a three-judge panel of the Fourth Circuit ripe for review by this Court in Petitioner's civil case below. Indeed, said judgment appears as an appendix to its Brief in Opposition. SETA also does not question that the Petition at bar is timely filed. Instead, it argues that, because the Appeals Court chose to deny itself jurisdiction to review Petitioner's appeals, this Court too is without jurisdiction for the same reason. Suffice it to note here that SETA is trapped in the Catch-22 of its illogic. This Court's jurisdiction to grant a writ of certiorari and afford the Petitioner the relief she seeks is beyond question.

REPLY TO SETA'S "STATEMENT OF THE CASE"

Rule 14 of the Rules of the Supreme Court of the United States sets forth the standards defining the content of a writ of certiorari. The Petition before this Court is prepared and submitted with as much attention to the requirements of the Rule as is possible. As required by the Rule, the Statement of the Case has the purpose of concisely "setting out the facts material to consideration of the questions presented."

Having presented the questions for review, as expressed concisely in relation to the circumstances of the case, McKenzie devoted the Statement of the Case to *map out each phase of the proceedings below* to ensure that the questions presented are reviewed within their precise factual context. To avert any claim that any fact has been misstated, McKenzie's Statement is buttressed by crucial direct quotations of both facts and rulings as reflected in the record. There is not a scintilla of statement of fact that would remotely suggest misstatement.[1]

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[1] At FN 1, p.2, of its Opposition, SETA asserts McKenzie's "mis-statement of facts" because she failed to mention the disposition of her claims in her independently filed and processed civil action *McKenzie v. SETA Corporation & Michael Montavon, P.C., C.A. # 99-381-A (EDVa), filed March 19, 1999.* Matters in said action were not stated considering their separate filing from the claims at bar. However, to the extent that SETA views both as one, McKenzie respectfully notes: [1] Upon filing the 1999 claims, the judge presiding over her underlying action assigned the case to himself and summarily dismissed the claims within 60-days of filing without discovery, without a hearing and in deviation from the controlling law on summary judgment. [2] McKenzie appealed the dismissal (4CCA # 99-1778-I). The Appeals Court granted, but then rescinded oral hearing, summarily affirmed the lower court and dismissed the appeal. For reasons indubitably known to SETA - extreme lack of resources - McKenzie was unable to seek relief before this Court. However, considering SETA's position, it would be a shimmering example of justice if this Court were to use its inherent power to do justice and review both cases!

But here again, the Opposition appears to be trapped in the Catch-22 of its making. SETA restated the questions presented and was exemplary in 'begging the questions.' Guided by this error, its Statement of the Case describes a self-serving calendar of perceived events that do not have much to do with the accurate and chronological proffer of the case provided in the Petition. Indeed, the Opposition's "Statement of the Case" is nothing more than another headline for its twenty-one page argument.

However, SETA is correct in pointing out that Appendix A to the Petition (i.e. the opinion below) omits page two thereof. Due to a printing error, the subject page of the opinion of the Court of Appeals was omitted. McKenzie apologizes for the oversight and endorses as accurate the opinion as reproduced at pages A-1 to A-5 of the Brief in Opposition.

REPLY TO SETA'S "ARGUMENT"

I. The Confirmation Order is not the "only final judgment"under the FAA, if at all it is "a final judgment," and is not relevant to the exercise of appellate jurisdiction over McKenzie's appeals

The Brief in Opposition is a twenty-one page expose of the premise and conclusion of the Appeals Court that the only "final" appealable order in the instant case is the order of the district court confirming the arbitral award. But this is wrong as a matter of the precise language of the statute itself, i.e. the FAA, 9 U.S.C. § 16. It is also in error because it is in direct conflict with the unanimous decision of this Court in *First Options of Chicago, Inc. v. Kaplan, 513 U.S. 938, 115 S.Ct. 1920 (1995)*, and the decision in *Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 121 S.Ct. 513 (2000)*, in addition to those of other Circuits. To wit:

A.

The inquiry begins with the plain language of the statute itself, FAA, 9 U.S.C. § 16 which, in relevant part, provides:

> **"§ 16. Appeals**
> **"(a) An appeal may be taken from –**
> **"(1) an order–**
> **"{...}**
> **"(D) confirming or denying confirmation of an award or partial award, or**
> **"{ ...}**
> **"(3) *a final decision* with respect to an arbitration that is subject to this title."**

The plain language of the statute leaves no doubt that *"order confirming or denying confirmation of an award or partial award,"* albeit appealable by mandates of Congress, *is distinct from and is **not** envisioned to be "a final decision with respect to an arbitration that is subject to [the] title."* Thus, while Congress has intended to list specific orders (including confirmation orders) as appealable, it did not intend for any one of them to be construed as *"a final decision"* perceiving, therefore, orders and decisions beyond the realm of the listed appealable orders, which represent final disposition of matters with respect to arbitration. *If Congress has intended orders "confirming or denying confirmation of an award" to be part of the "final decision(s)" envisioned by § 16(a)(3), it would have fashioned the provision with the additional (inexpensive) word "**other** final decision...."* And if, as SETA and the Court below would have us believe, Congress had intended orders confirming or denying confirmation of arbitral awards to be the *"only"* final orders or decisions appealable, ***it would have eliminated § 16(a)(3)*** and confined itself to the list of appealable orders it enumerated.

The reading of the statute proffered herein is precisely what this Court has long endorsed in interpreting Congressional statutes. Thus, it is held: ***"[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."*** Bates v. United States, *522 U.S. 23, 29 (1997).* And it is a familiar maxim:

> ***"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."*** Russello v. United States, *464 U.S. 16, 23 (1983);* Bates, *op. cit., 29-30.*

Like dicta abound, *vide:*

> "In interpreting a statute, court first examines its language to determine whether Congress has directly spoken to precise question at issue, and *if intent of Congress is clear, that is the end of the matter* because court must give effect to unambiguously expressed intent of Congress." Vesser v. Office of Personnel Management, *29 F.3d 600 (Fed. Cir. 1994).* See also, inter alia, Imazio Nursery, Inc. v. Dania Greenhouses, *69 F. 3rd. 1560 (Fed. Cir. 1995), cert. denied, 116 S.Ct. 2549, 518 U.S. 1018;* Difford v. Secretary of Health & Human Services, *910 F.2d 1316 (6th Cir. 1990);* Kerr v. Puckett, *138 F.3d 321 (7th Cir. 1998);* Hightower v. Texas Hosp. Ass'n., *65 F.3d 443 (5th Cir. 1995).*

Thus, not only that it is wrong to construe the order confirming the arbitration award as a *"final"* order *when the statutory language expresses Congressional exclusion of the term with respect to such orders*, it compounds the error to refer to said order as "the only final appealable order" as the Appeals Court concluded.

B.

A seminal consideration governing review on certiorari is when a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court [Rule 10 of the Rules of the Supreme Court]. Beyond its departure from the statutory law as above enunciated, the opinion below is also in conflict of this Court's decisions on the exceptionally significant issues of appellate jurisdiction.

A core component of McKenzie's appeals involve her claim that she has been deprived her Seventh Amendment jury trial right absent a valid arbitration agreement between her and SETA and upon the premise of the Order of August 22, 1997 compelling arbitration which was secured by fraud and deceit perpetrated upon the district court. *{Please also see Part II, infra}*. In dismissing the appeal, the Appeals Court reasoned that it has no jurisdiction over the appeal because McKenzie did not appeal the order confirming the arbitral award (rendered after the appeal had been lodged) which the Court construed as the only order appealable under the FAA.

Both the reasoning and conclusion of the Court are diametrically opposite of the decision of this Court on the same issue. Not only that the jurisdiction of the Courts of Appeals to review appeals from order directing arbitration is firmly established but so are the standards of review the Appellate Courts must apply. And the exercise of such appellate jurisdiction is vested *"regardless"* of the status of confirmation

orders. Hence, in *First Options of Chicago, Inc. v. Kaplan, 513 U.S. 938, 115 S.Ct. 1920 (1995)* this Court unanimously held:

> "Court of Appeals should accept district court's findings of fact regarding ***agreement to submit issue to arbitration*** if not 'clearly erroneous' but decide questions of law *de novo*, ***regardless of whether district court has confirmed or denied confirmation of arbitration award.***"

The conflict of the opinion below with this Court's decision is apparent. Even more so when one considers *the procedural timing* the Fourth Circuit itself has defined for appeals from orders compelling arbitration, a decision McKenzie relied on [and SETA itself conceded to, please *Petition, page 16]* in lodging her appeal: Such appeals are reviewed ***"after the arbitration has gone forward to final award"*** *American Cas. Of Reading Pennsylvania v. L.J., Inc., 35 F. 3d. 133, 136-137 (4th Cir. 1994).* There can be no dispute that McKenzie's appeals were lodged "after" the arbitration had run its course and final award rendered!

But the conflict does not stop here. By positing its jurisdiction upon appeal lodged from order confirming the arbitration award and declaring same as the sole "final" decision appealable, the Appeals Court has rendered further conflict with yet another important ruling of this Court. For, it has been held that *"**(t)he FAA does permit parties** to arbitration to bring a **separate proceeding** in a district court to enter judgment on an arbitration award once it is made - sic - (or to vacate or modify it) ...."* *Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 85; 121 S.Ct. 513, 520 (2000).*

As propounded in the *Petition, pages 19-25*, the ***"separate" proceedings*** the FAA permits parties to initiate are distinguished between those the party aggrieved by the award

may initiate [under FAA, 9 U.S.C. § 10 *cum* 12] and those that may be initiated by the party favored by the award pursuant to § 9 of the Act. As proffered in the Petition, the "procedures to be followed by the two parties are ***parallel, distinct and separate*** from each other" and the separate proceeding initiated by one party does not foreclose the other to pursue the separate proceeding she is entitled to.

Thus, when McKenzie filed her First and Second motions to vacate the arbitral award and be granted her Seventh Amendment jury trial right, she initiated ***"separate proceeding"*** as permitted by the FAA (and within the tenets of *Green Tree Financial Corp., supra)*. When the district court denied her motions by its Orders of March 29, 1999 and April 30, 1999 (respectively at *Petition, pages A10 and A14*), those orders became "a final decision with respect to an arbitration" appealable within the purview of the FAA, 9 U.S.C. § 16(a)(3). There was nothing else left for the district court to do with respect to those *separate proceedings*; please see, inter alia, *Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867, 114 S.Ct. 1992 (1994), Evans v. United States, 504 U.S. 255, 259-260, 112 S.Ct. 1881 (1992), Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631 (1945).*

Indeed, in a prior decision that McKenzie relied on to lodge her appeal, the Appeals Court itself had sustained by firm dicta the tenor of the arguments herein: ***"We ... review as final judgment any district court action pursuant to 9 U.S.C. § 10."*** *Humphrey v. Prudential Securities, Inc., 4 F.3d 313, 319 (4th Cir. 1993).* By crowning the separate proceeding and confirmation of the arbitral award as the sole genesis for appellate jurisdiction and dismissing McKenzie's claims upon such premise, the Appellate Court has profoundly departed from the controlling decisions of this Court and the statutory scheme of the FAA as intended by Congress.

II. "Silence of the Lamb" - What the Brief in Opposition Completely Fails to Address

As enunciated in her *Petition [pages 28-30]*, McKenzie's seminal claim has been that SETA obtained the August 22, 1997 order compelling arbitration by extrinsic fraud committed upon the district court thereby defeating the legitimate exercise of her Seventh Amendment right to jury trial. What she sought by her First Motion and was denied is the *equitable relief* she is entitled to under Rule 60(b)(3) of the Federal Rules of Civil Procedure for relief from order procured by extrinsic fraud committed upon the court. *The relief she sought is beyond the reach and realm of the FAA. It is a relief that long preceded the very conception of the FAA.* The disgorgement of gain obtained by an act of deceit or fraud committed upon the court and the equitable relief afforded to the victim thereof remains to be a defining gravamen of the blind goodness of justice we all identify with; see *Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997 (1944).*

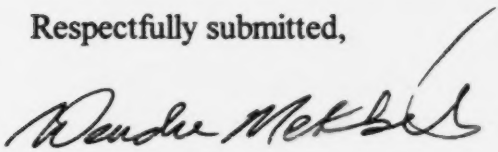
The Brief in Opposition is completely silent on this component of the Petition. Nevertheless, *the jurisdiction of the Appeals Court to review McKenzie's appeal remains plenary pursuant to 28 U.S.C. §§ 1291 cum 1294(1).* There is nothing in existing jurisprudence that would suggest that any content of the FAA has either modified or diminished this plenary jurisdictional authority of the Appeals Court to ensure its primary function - that no one shall garner the fruits of a judgment or order obtained by an act of deceit or fraud perpetrated upon the court. Writ of Certiorari should be granted to remedy the substantial departures from substantive law.

CONCLUSION

It is apparent that SETA has not offered any credible reason that should deter the grant of the Petition for a Writ of Certiorari. The rationale for review and reversal of the opinion below could not be more evident.

WHEREFORE, for the reasons propounded in the Petition, the arguments herein made, and the interest of justice, the Petitioner respectfully requests that her Petition for a Writ of Certiorari be GRANTED for the ultimate purpose of remanding her appeals for review on merits.

Respectfully submitted,



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